COVERSHEET

Minister	Hon Brooke van Velden	**Portfolio**	Workplace Relations and Safety
Title of Cabinet paper	Providing greater certainty for contracting parties	**Date to be published**	14 October 2024

List of documents that have been proactively released		
Date	**Title**	**Author**
September 2024	Providing greater certainty for contracting parties	Office of the Minister for Workplace Relations and Safety
28 August 2024	Providing Greater Certainty for Contracting Parties ECO-24-MIN-0179 Minute	Cabinet Office
15 August 2024	Regulatory Impact Statement: Contractors – Providing greater certainty for contracting parties	MBIE
11 July 2024	Briefing: Contractors – Options for an exclusion that gives more weight to intent	MBIE
7 June 2024	Briefing: Initial analysis of Proposal to put more weight on 'intention' when assessing employment status	MBIE
13 May 2024	Aide Memoire: Meeting with Freightways on 16 May 2024	MBIE
29 April 2024	Aide Memoire: Meeting with Uber on 1 May 2024	MBIE
19 April 2024	Briefing: Scope of policy work on the contractor/employee boundary	MBIE
27 March 2024	Aide Memoire: Meeting with NZ Post on 28 March 2024	MBIE
19 December 2023	Briefing: Issues related to the definition of employee	MBIE

Information redacted **YES**

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BRIEFING

Issues related to the definition of employee

Date:	19 December 2023	**Priority:**	Medium
Security classification:	In Confidence	**Tracking number:**	2324-1073

Action sought		
	Action sought	**Deadline**
Hon Brooke van Velden **Minister for Workplace Relations and Safety**	Discuss with officials to support the development of your policy work programme	15 January 2024

Contact for telephone discussion (if required)				
Name	**Position**	**Telephone**		**1st contact**
Alison Marris	Manager, Employment Standards Policy	04 901 8564	Privacy	✓
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The following departments/agencies have been consulted
N/A

Minister's office to complete:

☐ Approved ☐ Declined
☐ Noted ☐ Needs change
☐ Seen ☐ Overtaken by Events
☐ See Minister's Notes ☐ Withdrawn

Comments

BRIEFING

Issues related to the definition of employee

Date:	19 December 2023	Priority:	Medium
Security classification:	In Confidence	Tracking number:	2324-1073

Purpose

This briefing discusses three issues related to the definition of an employee, including the ability of contractors to challenge their employment status. This is intended to support your discussions with officials about the development of your priorities for the Workplace Relations and Safety portfolio.

Executive summary

We note that in the National/Act Coalition Agreement there is a commitment to: "*Maintain the status quo that contractors who have explicitly signed up for a contracting arrangement can't challenge their employment status in the Employment Court*". This commitment potentially involves consideration of the definition of an 'employee' in the Employment Relations Act 2000. There are issues with other aspects of the definition of 'employee' that are also worthy of consideration as part of the work programme.

Central to the issues in this area is the balance between certainty for hiring organisations[1] and protections for workers with low bargaining power.

The definition of 'employee' in section 6 of the Employment Relations Act 2000 (ER Act) is general in nature, defining an employee as a person who is "employed by an employer to do any work for hire or reward under a contract of service". Some specific inclusions (homeworker) and exclusions (volunteers) are identified. In interpreting this definition, the ER Act requires that the dispute resolution system[2] "is not to treat as a determining matter any statement by the persons that describes the nature of their relationship", and identify whether the true nature of the relationship between the hirer and the individual worker is one of employment.

Over time a number of tests to standardise this assessment have been developed. However, some cases arise where the outcome of decision making by the dispute resolution system is hard to predict. While the system works adequately for most organisations and workers, and may offer protections for workers if they are able to successfully challenge their employment status in the Employment Relations Authority (the Authority) or Employment Court, it can result in a lack of certainty for some organisations and workers.

The three main issues discussed in this paper stem from this uncertainty. In some limited circumstances an organisation may think it is complying with the law, but later find it has unforeseen liabilities where:

- a worker engaged as a contractor is later found to be an employee
- a volunteer is later found to be an employee (this could include interns, see paragraph 49)
- an employee initially engaged on a casual basis, has in practice become a permanent employee (either part-time or fixed term).

[1] The term "organisations" is used in this paper to include businesses, NGOs and government organisations; which may engage workers as employees, contractors or volunteers.
[2] The dispute resolution system referred to in this paper is the Employment Relations Authority, Employment Court and higher courts.

The increased use of internet-based gig work has raised the profile of issues arising from the employee/contractor boundary, including the consistency of decision making by the dispute resolution system, which is based on the individual facts of each case. An appeal of an Employment Court decision that four Uber drivers are employees is pending, and has been reported as being scheduled for March 2024.

A new or amended statutory definition of 'employee' could provide an opportunity to clarify the status of workers in more frequently disputed areas. There are a number of possible approaches, including the ACT party's manifesto commitment to "amend the Employment Relations Act so that contractors who have explicitly signed up for a contracting arrangement can't challenge their employment status in the Employment Court". Protections exist in some overseas jurisdictions for contractors with low bargaining power (without making them employees) which could be investigated as part of this work. However, there is no widely agreed international best practice. There are differences between jurisdictions and the approach in each country is highly specific to its regulatory context.

Depending on your objectives, we can provide further advice on options for policy work to look at a range of issues affecting contractors, volunteers and/or casual employees simultaneously as a larger project, or advanced separately on priority issues. Changing the definition of employee and many of the approaches to increasing certainty in the employee / contractor boundary require legislation to implement, so would take some time. We are available to discuss your objectives and can provide more detailed advice to help you shape the work programme.

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

a **Note** that the National /Act Coalition Agreement includes a commitment to: "Maintain the status quo that contractors who have explicitly signed up for a contracting arrangement can't challenge their employment status in the Employment Court".

Noted

b **Note** this paper canvasses three presenting issues in relation to the definition of 'employee':

a. boundary issues between 'employees' and contractors

b. boundary issues between 'employees' and volunteers (including interns)

c. definitional issues between workers employed on a casual and permanent basis.

Noted

c **Note** that we would like to discuss your objectives and priorities regarding the statutory definition of 'employee', in order to provide further advice and options for this area of work.

Noted

Alison Marris
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Workplace Relations and Safety Policy, MBIE

19 / 12 / 2023

Hon Brooke van Velden
Minister for Workplace Relations and Safety

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Background

1. Most workers in New Zealand are employees. Based on the June 2023 Household Labour Force Survey, about 81% of workers are employees and 4.2% of these are casual employees. A further 12.2% of workers are self-employed with no employees. The remainder are employers (5.8%) or other (0.9%).[3] Contractors are a sub-set of the 'self-employed with no employees' category. In 2018 just over 5% of employed New Zealanders reported working as self-employed contractors.[4]

2. Section 6 of the ER Act provides only a general definition of 'employee'[5]: Employee means "any person of any age employed by an employer to do any work for hire or reward under a contract of service". The ER Act directs the Employment Court or Authority to consider the individual circumstances of each worker and determine employment status on a case-by-case basis.

We would like to discuss the Coalition Government's commitment on the status of contractors and clarify your objectives in this area

3. The National/Act Coalition Agreement contains the priority to: "*Maintain the status quo that contractors who have explicitly signed up for a contracting arrangement can't challenge their employment status in the Employment Court*". This is similar to the ACT party manifesto commitment to: *"explicitly exclude independent contractors from the definition of employee"*.[6] We would like to discuss your objectives and can develop options to help achieve them.

Workers may be employees, contractors or volunteers

4. The distinction between employees (who have employment rights) and contractors and volunteers (who do not) reflects historical assumptions about different types of legal relationship:

   a. The concept of the 'employment relationship' (and the 'contract of service') evolved from the idea of master/servant relationships. Employment protections are largely based on the assumption of a permanent ongoing relationship between the parties, in which employers are considered to have a high degree of control over their employees. Parties to an employment relationship have a broad range of obligations to deal with each other in good faith. This includes: being responsive and communicative; not acting in a misleading or deceptive way; before making a decision which may result in employees losing their job the employer must give affected employees sufficient information to understand the proposal and an opportunity to comment.

   b. The concept of a 'contractor/principal relationship' comes from ordinary contract law, and a 'contract for services' is assumed to be an arm's length contract between two independent entities. Contractors are assumed to be operating in business on their own account, and to accept the risks and benefits of doing so. In accepting these risks, contractors are able to profit in a way employees cannot.

   c. For genuine voluntary work, there is no contractual relationship at all. Volunteers don't work in performance of a contractual "bargain" with obligations on both sides. Rather, voluntary work is undertaken gratuitously, without any expectation of a reciprocal benefit.

Employees have employment rights and obligations under New Zealand law.

5. Employees' rights include the right to: a written employment agreement; KiwiSaver contributions; be paid at least the minimum wage; rest and meal breaks; various types of

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[3] Figures taken from StatsNZ Household Labour Force Survey, 2023 Q2.

[4] One in 20 employed New Zealanders are contractors; StatsNZ, 1 July 2019.

[5] The definition of employee is subject to certain exclusions and inclusions, as discussed in paragraph 12.

[6] This ACT party manifesto commitment is provided in full in **Annex One**.

leave, including annual and public holidays, sick and bereavement leave; the right to join a union who can bargain collectively for wages and other terms and conditions of work; be treated fairly; a specialised dispute resolution system.

6. Employees also have responsibilities to their employers, including to adhere to the terms of the employment agreement, and are bound by the duty of good faith and a common law duty of fidelity to their employer.

Other workers who consider their relationship is one of employment may seek to confirm employment status in order to access employment rights

7. The requirement for the dispute resolution system to "look through" the stated form of the relationship between an organisation and a worker to assess its "real nature" serves a protective purpose, ensuring that a worker that is engaged in a way that is effectively employment can access the relevant protections.

8. If a worker considers they are an employee, despite any statement to the contrary, but they are not being treated as such by an organisation, they can seek a decision on their status by the dispute resolution system. Seeking a decision of this type is costly, time-consuming and the outcome is uncertain. The resulting finding is restricted to the individual(s) concerned, even if there are other workers in a similar situation.

9. This regulatory approach places workload on the dispute resolution system to produce a volume of individual assessments in a timely manner. It also relies on the worker having the financial and other resources necessary to mount a challenge in the system.

10. Over time, the dispute resolution system has developed a series of tests to guide how they determine whether a worker is an employee or a contractor:

    a. **The intention test**: the type of relationship that the parties intended is relevant, but does not determine the true nature of the relationship on its own. Intention can normally be worked out from the wording in parties' written agreement (if there is one).

    b. **The control vs independence test**: the greater the control exercised over the worker's work content, hours and methods, the more likely it is that a person is an employee. A worker with greater freedom to choose who to work for, where to work, when to work, the tools used and so on, is more likely to be a contractor.

    c. **The integration test**: this looks at whether the work performed by a person is fundamental to the employer's business. The work performed by a contractor is normally only a supplementary part of the business.

    d. **The fundamental/economic reality test**: this looks at the total situation of the work relationship to determine its economic reality. A contractor is a person in business on their own account.

Legislation can specify that specific groups always are (or are not) employees

11. The test used by the dispute resolution system to decide who is an employee applies to most workers in New Zealand. However, the ER Act identifies some groups of workers that this test does not apply to.

12. The ER Act[7] specifies that homeworkers (persons contracted in the course of another person's trade or business to do work in a dwellinghouse) are always employees. The ER Act also excludes volunteers from being employees, and specifies that the employment

[7] The ER Act, Section 6.

status of screen production workers, real estate agents and sharemilkers is decided by other legislation.[8]

The definition of ‘employee’ balances certainty and worker protection

The present arrangements can produce uncertainty at the margins…

13. In the majority of cases, the employment status of workers is determined by agreement between organisations and the workers they hire. Comparatively few contractors[9], unpaid workers (eg interns) or casual employees test their status by seeking a determination that they are an employee; or, in the case of casual employees, a permanent employee.

14. When such determinations are sought, the reliance on the dispute resolution system to produce case-by-case assessments can result in uncertainty for organisations. Although this uncertain decision making affects a relatively small proportion of all workers, it may have a disproportionate effect on organisations that rely on contractual models with some of the characteristics of employment, including in the growing internet-based gig economy.[10]

15. Greater certainty would reduce the risk of unforeseen costs arising for affected organisations, resulting from a worker later being found to be an employee. It is also arguable that certainty supports organisations to be more productive, by using their resources more efficiently.

… but this uncertainty can also deter exploitation

16. At present workers are able to seek access to employment protections through a determination of employee status. While this generates uncertainty for organisations, it may help deter some organisations from engaging in more exploitative practices. Anecdotal evidence suggests misclassification of employees as contractors is more common, although misclassification as volunteers or casual employees is also possible.

17. The creation of more certainty could be explored at the margins of ‘employee’ status (for example through further inclusions or exclusions from the definition of employee). There may also be a case for policy work on the adequacy of regulatory protections available for workers operating under a contract for services but who may lack genuine bargaining power. Australia has introduced legislation[11] to regulate its gig workers, which is discussed at paragraph 36.

18. The remainder of this briefing outlines in more detail how the ‘boundary’ or definitional issues at the margins of standard employee status play out in three labour market contexts:

    a. boundary issues between ‘employees’ and contractors

    b. boundary issues between ‘employees’ and volunteers (including interns)

    c. definitional issues between workers employed on a casual and permanent basis.

[8] Screen Industry Workers Act 2022; Real Estate Agents Act 2008; and Sharemilking Agreements Act 1937.

[9] In the period 2016 to 2020 there were 86 cases in the Employment Relations Authority and six in the Employment Court regarding whether a worker was an employee or an independent contractor.

[10] Gig workers work in the gig economy, which is a labour market that relies heavily on temporary and part-time positions filled by independent contractors and freelancers rather than permanent employees.

[11] Fair Work Legislation Amendment (Closing Loopholes) Bill 2023, Part Two.

a. Boundary issues between employees and contractors

In some situations organisations may be uncertain whether their workers are employees or contractors

19. If workers that an organisation thought were contractors are later found to be employees, this can impose additional costs on the organisation associated with the need to meet minimum employment standards, like annual and sick leave, paid public holidays, and superannuation contributions (see paragraph 5 for a more comprehensive list).

20. Uncertainty about employee/contractor status is more likely to exist in situations at the margins of the four tests used by the dispute resolution system to identify employees (see paragraph 10). Where uncertainty exists this may be a disincentive for the organisations to invest or commit to a particular business model. It's not possible to get a declaratory judgment that covers all people employed/engaged in a role. This is because the 'real nature of the relationship test' is a judgement that looks at how each individual worker's relationship with the organisation that hires them operates in practice.

Commercial laws provide contractors with less protections than employees

21. Workers engaged on contract for services do not have the employment rights listed in paragraph 5. Instead the relationship between hiring organisations and workers is governed by contract, commercial and competition laws, which assume workers are in business on their own account. These laws include:

    a. the Fair Trading Act 1986 and the Commerce Act 1986, which prohibit some practices in business-to-business transactions

    b. the Contract and Commercial Law Act 2017, which provides some protection to parties to a contractual arrangement, such as when there may be a mistake in a contract, or when one party has been induced to enter into a contract by another party's misrepresentation.

22. The more 'light touch' regulatory settings for contractors can be mutually beneficial for both organisations and contractors where power is relatively evenly balanced. Organisations with uncertain demand benefit from offering flexible, short-term contracts. Workers may choose to accept work as a contractor to suit their individual lifestyle and preferences. Some enjoy high levels of bargaining power, and can negotiate enhanced remuneration and flexibility that makes minimum employment standards less relevant to their working lives.

23. Additional protections for businesses (including contractors) were added to the Fair Trading Act in 2021, but these are generally less accessible than those in the employment jurisdiction. These are outlined in **Annex Two**. Contractors are also covered by standard health and safety at work laws, and protected by the Human Rights Act 1993 and the Privacy Act 2020.

Some contractors with low bargaining power are at risk of exploitation

24. Some workers with low bargaining power hired on contract may not be well protected by the commercial regulatory system, yet do not have access to employment protections. While a portion may be misclassified and if tested would likely be found to be employees by the dispute resolution system, others will be genuine contractors with poor terms and conditions, reflecting their lack of bargaining power.

25. There are no minimum entitlements for genuine contractors, and they can earn less than the minimum wage while working significant hours. While this may be a genuine choice for a contractor who is willing to take a risk to build up their own business, there are other contractors who have said that they were not given the information to do appropriate due diligence, or did not understand the terms, before entering such a contract.

26. In the period 2016 to 2020, the dispute resolution system found, in about half of the cases, that workers engaged on contract were employees. An example is the 2020 Leota case[12] in the courier industry. The Employment Court declared that Mr Leota, who worked for the courier company Parcel Express Ltd, was an employee throughout his time working there, and not an independent contractor. Mr Leota spoke English as a second language and the Employment Court found that it was likely that he was neither provided a copy of the contract, nor a chance to read and seek advice on it, before being asked to sign, and had no real understanding of what his status was when working for the company. The evidence suggested to the Employment Court that Mr Leota had not been running his own business and was employed in the business of Parcel Express. This decision is unique to the facts of the specific case and does not affect the employment status of other courier drivers.

27. However, despite some contractors experiencing poor outcomes, many contractors do not wish to be employees, seeking instead to retain contractor status but have access to greater protections than are currently available to contractors.

Recent policy work on the employee / contractor boundary focussed on the correct classification of employees

28. In 2019 public consultation was undertaken on a wide range of potential approaches to issues experienced at the employee/contractor boundary. There were 11 options within four broad approaches:[13]

    a. deter misclassification of employees as contractors

    b. make it easier for workers to access a determination of their employment status

    c. change who is an employee under New Zealand law

    d. enhance protections for contractors without making them employees.

29. Submissions were divided and did not clearly favour a single approach. There was widespread support for more resourcing to enforce the current system, and widespread opposition to creating a new category of workers eligible for a limited set of rights and protections. There were mixed levels of support for other options, such as placing the burden of proving a worker is a contractor on organisations, giving Labour Inspectors the ability to decide workers' employment status, and defining some occupations of workers as employees.

A Tripartite Working Group on Better Protections for Contractors was established in 2021

30. The Working Group comprised union, employer and public sector representatives. It reported in December 2021[14], recommending a stronger distinction between employment and self-employment status in law as a first priority to address misclassification. A clearer definition of 'employee' was at the heart of the Group's proposal. They also considered that the definition of employee should be amended to include apprentices.[15] This is already clear in the Education and Training Act 2020[16], but there could be value in clarifying this in employment law, where currently employment status turns on what the dispute resolution system finds to be the "real nature of the relationship".

31. The Tripartite Working Group also recommended that at a later stage, consideration should be given to a range of potential interventions "to mitigate the power imbalances that exist

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[12] [2020] NZEmpC 61 EMPC 167/2019

[13] Better Protections for Contractors; Discussion Document, Ministry of Business Innovation and Employment, November 2019.

[14] Report of Tripartite Working Group on Better Protections for Contractors; December 2021.

[15] Data from the Tertiary Education Commission in 2022, indicated that about 450 apprentices were self-employed, while about 60,000 were engaged as employees.

[16] Section 362 of the Education and Training Act 2020 states: "Training agreements and apprenticeship training arrangements are part of the employment agreement between the employee and employer concerned."

within certain contractor/principal (business-to-business) relationships, without seeking to characterise those relationships as employment relationships".

32. The Tripartite Working Group identified potential interventions in the contractor/principal category ranging from pre-contract disclosure requirements and industry codes[17] (which could mitigate information asymmetries identified by the Working Group by requiring information sharing, so that contractors can better understand the deal being offered by a principal before accepting it), through to higher-impact interventions such as removing barriers to collective bargaining by groups of contractors or providing other statutory rights to 'dependent contractors'.

Further work was put on hold pending the outcome of the Uber court case

33. Policy development was undertaken based on the recommendations of the Tripartite Working Group to address misclassification of workers as contractors, but public consultation on proposals was postponed pending the outcome of the Uber appeal. It has been reported that the appeal is scheduled for March 2024.[18]

34. If the appeal finds that the Uber drivers are employees, it could encourage other gig workers to challenge their employment status. This could be time consuming for all parties, require significant resources from workers, organisations and the dispute resolution system, and the results may not reflect a consistent policy position. If the Government wishes to take action to create certainty (one way or the other) it could do so prior to a Court decision, or wait and respond.

There is no widely agreed international best practice in this area

35. There is no established international best practice way to balance certainty for hiring organisations and protections for workers with low bargaining power. There are differences between jurisdictions, and the approach in each country is highly specific to its regulatory context. Further information on international comparisons will be included in future work.

Australia has introduced legislation to regulate its gig workers

36. The Australian Government has introduced legislation[19] to protect gig workers, which may be passed in early 2024. The bill provides protections for "employee-like workers" (such as in food delivery, ride share and the care economy) on digital platforms, to be set by the Fair Work Commission. Eligible parties will be able to apply to the Fair Work Commission for minimum standards orders that are tailored for the work performed under them, covering matters such as payment terms, working time, record-keeping and insurance. Employee-like workers will also be protected from unfair deactivation by digital labour platforms, and will have the right to ask the Fair Work Commission to resolve disputes.

37. The Australian changes are not intended to affect independent contractors who have a high-degree of control and autonomy over their work, such as skilled tradespeople. The Australian Minister for Employment and Workplace Relations said "This is about protecting workers who don't meet the definition of 'employee' but who are not genuine small businesses either."[20]

Other jurisdictions also have protections for contractors with low bargaining power

38. Protections existing in some overseas jurisdictions for contractors with low bargaining power (without making them employees) and could be investigated. For example in the United Kingdom, regulations stop organisations from preventing contractors who earn less than a lower limit from taking up other jobs if they wish to supplement their income.

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[17] An industry code is a set of rules about agreements and conduct between parties. It could be voluntary or compulsory and would be developed with significant industry input and/or ownership.

[18] New Zealand Herald; 8 December 2023.

[19] Fair Work Legislation Amendment (Closing Loopholes) Bill 2023, Part Two (Australia).

[20] Media release; Australian Minister for Employment and Workplace Relations, 31 August 2023

Uber's perspective

39. Uber has advocated for a policy intervention in preference to the dispute resolution system deciding the matter through case law (which may find some contractors to be employees). In a November 2022 online article Uber said it believes that "reforms should be debated, agreed and brought into law by Parliament. The goal should be new laws that give workers and businesses the certainty they deserve."[21] The article goes on to explain that "In many countries around the world, Uber is working with unions and governments to establish minimum standards and protections for workers in the gig economy while preserving the independence they tell us they love." Uber has indicated that minimum standards for gig workers could include "minimum earnings standards for gig workers while working".

b. Boundary issues between 'employees' and volunteers (including interns)

In some situations volunteers may be found to be employees

40. The difference between a voluntary role and employment is often clear. However, there are some scenarios where work, not undertaken for wages, can cross into the category of an employment relationship, and so require payment for work performed in line with statutory minima, along with the provision of other entitlements. For example, in New Zealand case law, issues relating to the boundary between employment and voluntary work have arisen in the context of:

    a. people who are described as volunteers, but who receive some form of reward

    b. unpaid work trials or work experience

    c. internships

    d. WWOOFing ("willing workers on organic farms") and similar arrangements.

How the employee/volunteer boundary is regulated

41. The legal starting point for this boundary issue is section 6 of the ER Act, which explicitly excludes volunteers from the definition of employee. A volunteer is defined as someone who (a) does not expect to be rewarded for their work, and (b) receives no reward for work performed.

42. If a person works under conditions that meet this exclusion, it follows that they are not an employee. However, the fact that someone receives a reward for work does not, on its own, mean that they're an employee. Further inquiry is necessary to determine the "real nature of the relationship" with reference to "all relevant matters" (ER Act, section 6).

43. In deciding whether a worker is in fact an employee, the dispute resolution system will have regard to the usual range of factors and common law tests (see paragraph 10 above). The nature of the "controlling entity" can be relevant but is not determinative on its own (working for the benefit of a for-profit entity is more likely to constitute employment). Other considerations include:

    a. the nature and extent of any "reward" received by the worker (it's clear from the case law that non-monetary rewards can count; but gratuitous payments or reimbursement of expenses don't constitute reward)

    b. whether the work is controlled and the organisation derives an economic benefit from the work (if yes, this supports a conclusion that the worker is an employee)

[21] Raising the bar for Kiwi gig workers; Uber Newsroom, November 2022.

c. arrangements where parties have clear mutual obligations are more likely to be considered employment relationships.

Recent case law demonstrates the fluidity of the employee/volunteer boundary

44. Several recent cases demonstrate how the principles described above are applied in practice.

    a. In two key Gloriavale cases, the Employment Court found that members of the Gloriavale Christian Community had in fact been employees, when performing work that had been variously described as "voluntary" or in the nature of "domestic chores". The judgments interpreted the "reward" as the provision of food, board, and the opportunity to live in the Gloriavale community. You will receive separate advice on the ongoing agency-level response to Gloriavale.

    b. In 2017, the Labour Inspectorate brought successful claims for wage arrears and penalties on behalf of two tourist "volunteers", who both received remuneration of $120 per week (plus food and accommodation) for working 40 hours per week on an organic farm. These "volunteers" performed a range of duties, and were also hired out to others to perform gardening and maintenance work.

    c. The Employment Relations Authority recently found a post-graduate student undertaking a practicum placement with the Ministry of Education as an "intern psychologist" to have been an employee for the duration of the internship. The interns were paid a scholarship by the Ministry for the 40 week period of their placement. The Ministry understood the internship as being primarily for the students' benefit, allowing them to meet the degree requirement for 1,500 hours of practical experience. In its finding, the Authority considered that the scholarship, the value of the supervision, and the prospect of future employment amounted to reward. The Authority adopted a broad view of the benefit of interns' work to the Ministry – citing the operational benefit of developing students' skills, and growing potential recruits.

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c. Definitional issues with casual employees

The uncertain parameters of “casual employment” can create risk for organisations

56. ‘Casual employee’ isn’t defined in employment legislation. The term is usually used to refer to a situation where the employee has no guaranteed hours of work and no regular pattern of work. Each time a casual employee accepts an offer of work it is treated as a new period of employment. Casual employees do not have to agree when offered work and have no expectation of regular or ongoing employment.

57. Casual employees have the same employment rights as other employees. However, as they are not employed between periods of work, employers can end a relationship with a casual employee simply by not offering further work.

58. Organisations use casual employees to manage temporary peaks in demand, or to cover short term absences. This is particularly common in the retail, warehousing, manufacturing, hospitality, health, and cleaning industries. Between four and five percent of paid employees in New Zealand typically state they are casual employees in their main job. The vast majority of paid employees (over 90 percent) state that they have a permanent employment relationship.

59. Employers can get caught out as casual employees may over time develop a regular pattern of work that may be found by the dispute resolution system to have, in practice, become permanent employees (or fixed-term employees). Employers may be unaware that a casual employee has become permanent and now has an expectation of future work and process requirements when employment ends.

60. The regulatory uncertainty can also have detrimental effects for employees. For example, during the height of COVID-19 MBIE observed a large number of complaints from casual employees whose employers had chosen not to access wage subsidies (despite being entitled to do so), leaving the workers with no source of income apart from emergency benefits. One reason for this response suggested by stakeholders is that, under current settings, accessing a subsidy could be understood as an implicit acknowledgement by the employer of an enduring obligation to provide work (contradicting the employee’s designation as a “casual”).

The current regulatory system balances certainty for organisations and protections for employees

61. As with the contractor and volunteer issues described earlier in this paper, when it comes to casual employees, the current regulatory system balances certainty for organisations and protections for workers. While uncertainty about the status of casual employees arises from the dispute resolution system’s requirement to determine the “real nature of the relationship” (in a similar way to decisions about employment status), this enables the system to extend the protections of permanent or fixed term employment to employees whose real relationship meets this definition. This discretion of the dispute resolution system limits the ability of some employers to classify employees as casual as a way of denying them the full range of their employment rights as employees (either part-time or fixed-term).

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Next steps

66. We would like to discuss your objectives and views on the appropriate balance between certainty for hiring organisations and protections for workers with low bargaining power, across the three areas discussed in this paper:

    a. contractors

    b. volunteers (including interns)

    c. casual employees.

67. Possible options for change will differ depending on the outcomes you wish to achieve. Once we understand your objectives, we can provide further advice on how to take the work forward. The potential approaches discussed in this paper require detailed policy development, which would need to be prioritised against other work in your policy work programme.

68. There are also subsequent choices to be made about the form that work would take. Confidential Advice We are available to discuss your options and can provide more detailed advice to help you shape the work programme.

[23] Fair Work Legislation Amendment (Closing Loopholes) Bill 2023, part Two.

Annexes

Annex One: ACT party manifesto commitment on the boundary between ‘employees’ and contractors

Annex Two: Additional protections for contractors added to the Fair Trading Act in 2021

Annex One: ACT party manifesto commitment on the boundary between 'employees' and contractors

The ACT party has a manifesto commitment directly relevant to the employment boundary issues raised in this paper. The ACT party policy is to:[24]

…"amend the Employment Relations Act so that contractors who have explicitly signed up for a contracting arrangement can't challenge their employment status in the Employment Court. The contract must meet certain minimum standards that protect workers' freedom to contract."

"Our policy would explicitly exclude independent contractors from the definition of employee, as long as the contracting relationship meets certain criteria. This would give greater certainty to workers and businesses that they are entering a contracting relationship, and will impose minimum conditions for the contract framework."

"The following criteria must be satisfied:

- a written agreement where the person is specified as an independent contractor and will not have access to full employee rights
- the person was given sufficient information and an adequate opportunity to seek advice before entering into a contract
- the agreement does not restrict the person from performing services or work for other businesses or undertakings, including competitors, or engaging in any other lawful occupation or work, except during the time from which the person commences a specified task provided by the business or undertaking until that task is completed;
- the business or undertaking cannot terminate the contract of the person for not accepting a specific task; and
- the business or undertaking has kept records in sufficient detail to demonstrate that the employer has complied with minimum entitlement provisions."

"A contractor who believes the terms and conditions of their contracts are unfair has recourse under the Fair Trading Act which deals with unfair contract terms. If the business or undertaking has not satisfied the above terms, the worker may challenge their employment status under the Employment Relations Act."

[24] Protecting choice and freedom to contract; ACT Party, downloaded 25 October 2023.

Annex Two: Additional protections for contractors added to the Fair Trading Act in 2021

These amendments added further protections to address unfair practices in a business-to-business context. Unfair contract terms provisions (which previously benefited only consumers) were extended to cover standard form small trade contracts, and a prohibition on unconscionable conduct in trade.

A standard form contract is one where the contract terms have not been subject to effective negotiation between the parties. This includes situations where a party is, in effect, required to accept or reject the terms of the contract in the form in which they were presented.

The Commerce Commission can apply to the District or High Court seeking a declaration that a term in a standard form contract is unfair if the term would cause a significant imbalance in the parties' rights and obligations, the term is not reasonably necessary to protect the interests of the party who would be advantaged by it, and the term would cause detriment (whether financial or otherwise) to a party.

The Fair Trading Act prohibits unconscionable business conduct. This is a business activity that is a substantial departure from New Zealand's generally accepted standards of business conduct. This is conduct of a type that rarely occurs and clearly departs from what is to be expected from those acting in good commercial conscience.

Unconscionable conduct can take many forms. Whether Courts consider conduct is unconscionable depends on the circumstances of the business or the affected person. Courts may consider a range of factors in assessing whether certain conduct is unconscionable and some of these factors are listed in the legislation. In summary, these are: the relative bargaining strength of the parties; the extent to which the parties acted in good faith; whether the affected party could protect their own interests given their characteristics and circumstances; whether the affected party could understand documents provided to them; the use of undue influence, pressure or unfair tactics by the business; whether the business made clear to the affected person anything the business might do that would adversely impact the affected person's interests or create a risk for them.

If found guilty of unconscionable conduct, businesses can be convicted and fined up to $600,000 and individuals can be liable for fines of up to $200,000. Courts can also make a range of other orders under the Fair Trading Act, such as requiring businesses to make compensation or to vary a contract.

AIDE MEMOIRE

Meeting with NZ Post on 28 March 2024

Date:	27 March 2024	**Priority:**	Medium
Security classification:	In Confidence	**Tracking number:**	2324-2682

Information for Minister(s)
Hon Brooke van Velden **Minister for Workplace Relations and Safety**

Contact for telephone discussion (if required)				
Name	**Position**	**Telephone**		**1st contact**
Alison Marris	Manager, Employment Standards Policy	04 901 8564	Privacy	✓
Tim Spackman	Senior Advisor, Employment Standards Policy	04 897 5059		

The following departments/agencies have been consulted
N/A

Minister's office to complete:

☐ Approved ☐ Declined
☐ Noted ☐ Needs change
☐ Seen ☐ Overtaken by Events
☐ See Minister's Notes ☐ Withdrawn

Comments

AIDE MEMOIRE

Meeting with NZ Post on 28 March 2024

Date:	27 March 2024	**Priority:**	Medium
Security classification:	In Confidence	**Tracking number:**	2324-2682

Purpose

To provide background information and talking points to support your meeting with NZ Post on Thursday 28 March 2024, at 11.30 am.

Alison Marris
Manager, Employment Standards Policy
Labour, Science and Enterprise, MBIE

27 / 3 / 2024

Background

1. You have agreed to meet with NZ Post on Thursday 28 March 2024, at 11.30 am in your office. NZ Post will be represented by David Walsh (Chief Executive), Brendon Main (Chief Operating Officer) and Kirstin Price (Senior Legal Counsel – Corporate Lead). Biographies of the meeting attendees are provided in **Annex One**.

2. NZ Post has indicated that in this meeting it is interested in the commitment in the National-ACT Coalition Agreement to *“maintain the status quo that contractors who have explicitly signed up for a contracting arrangement can’t challenge their employment status in the Employment Court.”*

3. NZ Post has a contractor model for their delivery partners (courier drivers and rural delivery partners). It is interested in hearing from you about the Government’s plans in this area. Talking points are provided in **Annex Two** to support your discussion.

About NZ Post

4. NZ Post delivers mail and packages to businesses and customers and provides logistics services for businesses, including many who are engaged in e-commerce. Many of NZ Post’s services are provided by their delivery partners (contractors) on a ‘contract for service’ basis.

5. As of February 2020, NZ Post was contracting with over 2,400 individual businesses to provide services. Ninety-nine percent of NZ Post’s tracked parcel products (78 million items per annum), and 30 percent of New Zealand’s mail (380 million items per annum) were delivered by contractors.

6. Several types of businesses contract to NZ Post:
   - one person one vehicle operations, often with one or two permanent part-time or full-time employees assisting the owner-operator
   - small-medium enterprises, with three to seven employees and two or three vehicles
   - larger, more complex business, with eight to twenty employees and a range of vehicles
   - a host business; an existing business such as a dairy, pharmacy or transport firm providing services in locations not economic for NZ Post to provide services.
7. The capital invested by these businesses can vary from $60,000 for owner-operators, or $200,000 for small-medium enterprises, through to more than $5-6 million in the case of large transport firms.
8. NZ Post recently announced it will reduce the number of staff who deliver mail, and it believes that over time having two separate delivery networks (mail and courier parcels) will not be commercially viable. The mail delivery service is likely to be replaced by contractors.
9. Unions and other stakeholders have suggested that the 'owner-driver' model used by courier companies such as NZ Post closely resembles employment. This is on the basis that, among other things, the drivers are under close control of the courier company, are required to wear a uniform, and usually have no ability to work for other companies.

Engagement with Ministry of Business, Innovation & Employment

10. NZ Post actively engaged with Ministry of Business, Innovation & Employment-led policy work in recent years on the regulatory environment for contractors. This included making a submission to the 2019 'Better Protections for Contractors' consultation, and attending one of the meetings of the Tripartite Working Group in 2021 to explain how the 'owner-driver' business model works in the courier industry.

Annexes

Annex One: Biographies of the meeting attendees

Annex Two: Talking points for meeting with NZ Post

Annex One: Biographies of the meeting attendees

	David Walsh, Chief Executive David became Chief Executive in May 2017. He joined NZ Post in February 2015 as Chief Financial Officer having previously held the position of General Manager Corporate and Finance at KiwiRail after his role as Chief Financial Officer was widened. David has experience in complex infrastructure, consumer products and services and leading large change projects. His professional background also includes Chief Operating and Chief Financial Officer at New Zealand Racing Board, and senior finance roles at Fonterra and TransAlta.
	Brendon Main, Chief Operations Officer Brendon joined NZ Post in December 2017 and was appointed Chief Operations Officer in October 2020. Prior to this he was General Manager Customer Service Delivery Northern at NZ Post. Brendon has over 15 years of experience leading operations, strategy and business development and customer service across transport and logistics organisations including Auckland Transport and Air New Zealand.
	Kirstin Price, Senior Legal Counsel – Corporate Lead Kirstin was appointed Senior Legal Counsel – Corporate Lead in January 2023 following two years as Senior Legal Counsel. Her career has spanned legal and public sector roles, including working at Ministry of Foreign Affairs and Trade, Ministry for Primary Industries, Creative New Zealand, and Loyalty NZ. Kirstin attained her Bachelor of Laws and Bachelor of Arts in Political Science from Victoria University of Wellington Te Herenga Waka.

Annex Two: Talking points for your meeting with NZ Post

Introduction

- Thank you for taking the time to meet with me today.
- I understand you engaged with MBIE officials in earlier work on the regulatory environment for contractors.
- I am interested in hearing about the contracting model you have with your delivery partners.

Priorities

- You might be aware that I recently announced my priorities, which are intended to restore business confidence and certainty.
- My priorities are related to the Holidays Act, contractors' arrangements, health and safety law and reform, and performance metrics for public services.
- There will be opportunities for consultation in much of this work and it is important to me that we hear from a range of voices during this process.

Contractors

- This Government wishes to ensure businesses and workers who explicitly agree to a contracting arrangement have certainty about the nature of that relationship.
- I have asked my officials for advice on policy options to increase certainty in contracting relationships and I am interested to hear your views about what effect these issues have on NZ Post.
- Free and frank

AIDE MEMOIRE

Meeting with Uber on 1 May 2024

Date:	29 April 2024	**Priority:**	Medium
Security classification:	In Confidence	**Tracking number:**	2324-3115

Information for Minister
Hon Brooke van Velden **Minister for Workplace Relations and Safety**

Contact for telephone discussion (if required)				
Name	**Position**	**Telephone**		**1st contact**
Alison Marris	Manager, Employment Standards Policy	04 901 8564	Privacy	✓
Tim Spackman	Senior Policy Advisor, Employment Standards Policy	04 897 5059		

The following departments/agencies have been consulted
N/A

Minister's office to complete:

☐ Approved
☐ Declined
☐ Noted
☐ Needs change
☐ Seen
☐ Overtaken by Events
☐ See Minister's Notes
☐ Withdrawn

Comments

AIDE MEMOIRE

Meeting with Uber on 1 May 2024

Date:	29 April 2024	**Priority:**	Medium
Security classification:	In Confidence	**Tracking number:**	2324-3115

Purpose

To provide background information and talking points to support your meeting with Uber on Wednesday 1 May 2024, at 11:45am.

Manager, Employment Standards Policy
Labour, Science and Enterprise, MBIE

29 / 4 / 2024

Background

1. You have agreed to meet with Uber on Wednesday 1 May 2024, from 11:45am to 12:15pm, in your office. Lewis Mills, Head of Public Policy at Uber New Zealand, and Andy Bowie, New Zealand General Manager will represent Uber. Biographies of meeting attendees are provided in **Annex One**. Alison Marris, Manager Employment Standards Policy, at the Ministry of Business Innovation and Employment, will also attend the meeting.

2. Uber is interested in your priority to increase certainty for contracting parties, while minimising risks of exploitation. Uber views employment law as uncertain and proposes amending the *Employment Relations Act 2000* (the Act), as detailed in **Annex Two.** Talking points are provided in **Annex Three** to support your discussion.

The Court of Appeal has reserved its decision on the Uber case

3. Uber's appeal of the Employment Court decision that four Uber drivers are employees, not contractors, was heard in the Court of Appeal on 19 and 20 March 2024. The section 6 test in the Act for whether a worker is an employee was discussed extensively by the Court.

4. To decide if a worker is an employee or contractor, section 6 of the Act instructs the judicial body to consider all 'relevant matters' when determining the real nature of the relationship between a business and a worker. This assessment is based on the common law tests, specified by the Supreme Court in *Bryson*[1]. The tests consider:

   - the intention of the parties

[1] James Bryson v Three Foot Six Limited [2005] NZSC 34.

- the level of control versus independence of the worker
- the extent to which the worker is integrated into the business
- the fundamental/economic reality of whether the worker is in business on their own account.

5. The Court said it must identify the mutual rights and obligations of the parties and assess whether these are indicative of an employment or contracting relationship. This meant looking at both what was written in the contract the drivers had with Uber and how the relationship operated in practice, ignoring the labels given to the relationship in the contract.

6. The Court reserved its decision, saying it would take time to deliver, due to the need to carefully consider all the evidence. In the recent *Mt Cook Airline*[2] decision, an appeal from the Employment Court, the Court of Appeal took approximately 10 months to deliver its decision.

Uber's proposal will be considered in future advice on options to increase certainty for parties to a contract for services

7. As we note in the briefing provided to your office on 19 April 2024, *Scope of policy work on the contractor/employee boundary* [2324-3050 refers], we understand your objective is to increase certainty for parties to a contract for services, while minimising risks of exploitation. Subject to your decisions on that paper, we will consider Uber's proposal in future advice we prepare for you.

8. Uber has provided detailed drafting for an amendment to the Act to give effect to its proposal. Uber's proposed amendments would exclude a person from the definition of employee, if a business meets **all** of the following requirements:

   - a written agreement stating the person is an independent contractor
   - no restrictions on the person working for other businesses, except during the time they are working for the business they have a contract with
   - no requirement that the person be available to work at certain dates, times, or for a minimum number of hours
   - termination of the contract cannot occur if the person does not accept a specific task.

9. As drafted, Uber's proposal would have retrospective effect, applying both to new agreements and agreements already in place. The presumption for New Zealand legislation is that it does not alter the legal status of past conduct, because this removes certainty around the legal status of the current conduct. As a result, retrospective legislation is rare in New Zealand and considered appropriate in very limited circumstances.

Annexes

Annex One: Biographies of meeting attendees

Annex Two: Uber's proposed changes to the *Employment Relations Act 2000*

Annex Three: Talking points for your meeting with Uber

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[2] Mount Cook Airline Ltd v E tū Incorporated [2024] NZCA 19.

Annex One: Biographies of meeting attendees

	Lewis Mills **Head of Public Policy, Uber New Zealand** Lewis Mills is responsible for Uber's public policy programme and engagement with regulators and Ministers in New Zealand. Lewis has a background in regulatory litigation and was a Crown prosecutor. He has also held legal and policy roles in the public sector. Prior to joining Uber in 2018, he was Senior Counsel to the Mayor of Auckland. Lewis has a BA/LLB (Hons) and studied at the University of Auckland and the University of Virginia School of Law.
	Andy Bowie **New Zealand General Manager** Andy returned to Uber as General Manager in January 2024. Andy co-founded My Auto Shop in 2020, an online vehicle maintenance platform connecting vehicle owners with mechanics, and he is now a Director. Prior to founding My Auto Shop, Andy held marketing and operations roles in both New Zealand and Singapore at Uber, before working as Country Manager for Uber Eats New Zealand. Andy has a Bachelor of Commerce, Economics and Management from the University of Otago.

Annex Two: Uber's proposed changes to the *Employment Relations Act 2000*

STRICTLY CONFIDENTIAL

PROPOSED AMENDMENTS TO EMPLOYMENT RELATIONS ACT

The proposed amendments are set out in red font below:

6 Meaning of employee

(1) In this Act, unless the context otherwise requires, employee—

(a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and

(b) includes—

(i) a homeworker; or

(ii) a person intending to work; but

(c) excludes a volunteer who—

(i) does not expect to be rewarded for work to be performed as a volunteer; and

(ii) receives no reward for work performed as a volunteer; and

(d) excludes, in relation to a film production, any of the following persons:

(i) a person engaged in film production work as an actor, voice-over actor, stand-in, body double, stunt performer, extra, singer, musician, dancer, or entertainer:

(ii) a person engaged in film production work in any other capacity; and

(e) excludes a person, in circumstances where a business or undertaking:

(i) has a written agreement with the person which states that the person is an independent contractor and not an employee;

(ii) does not restrict the person from performing services or work for other businesses or undertakings, including competitors, or engaging in any other lawful occupation or work, except during the time from which the person commences a specified task or engagement offered by the business or undertaking until that task or engagement is completed;

(iii) does not require, as a condition of maintaining the engagement with the business or undertaking, the person to be available to perform tasks or other services on specific dates, or at specific times of day, or for a minimum number of hours;

(iv) does not terminate the contract of the person for not accepting a specific task or engagement offered by the business or undertaking.

(f) The exclusion specified in section 6(e) applies from the date that a person enters into an agreement with a business or undertaking as described in section 6(e) including any agreement entered into prior to the date of the commencement of this provision.

(1A) However, subsection (1)(d) does not apply if the person is a party to, or covered by, a written employment agreement that provides that the person is an employee.

(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2), the court or the Authority—

(a) must consider all relevant matters, including any matters that indicate the intention of the persons; and

(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

(4) Subsections (2) and (3) do not limit or affect the Real Estate Agents Act 2008 or the Sharemilking Agreements Act 1937.

(5) The court may, on the application of a union, a Labour Inspector, or 1 or more other persons, by order declare whether the person or persons named in the application are—

(a) employees under this Act; or

(b) employees or workers within the meaning of any of the Acts specified in section 223(1).

(6) The court must not make an order under subsection (5) in relation to a person unless—

(a) the person—

(i) is the applicant; or
(ii) has consented in writing to another person applying for the order; and
(b) the other person who is alleged to be the employer of the person is a party to the application or has an opportunity to be heard on the application.

(7)
In this section,—

business or undertaking includes any business or undertaking, whether or not the business or undertaking is conducted for profit or gain, and whether alone or with others

film means a cinematograph film, a video recording, and any other material record of visual moving images that is capable of being used for the subsequent display of those images; and includes any part of any film, and any copy or part of a copy of the whole or any part of a film

film production means the production of a film or video game

film production work—
(a) means the following work performed, or services provided, in relation to a film production:
(i) work performed, or services provided, by an actor, voice-over actor, stand-in, body double, stunt performer, extra, singer, musician, dancer, or entertainer (whether as an individual or not):
(ii) pre-production work or services (whether on the set or off the set):
(iii) production work or services (whether on the set or off the set):
(iv) post-production work or services (whether on the set or off the set):
(v) promotional or advertising work or services (whether on the set or off the set) by a person referred to in subparagraphs (i) to (iv); but
(b) excludes work performed, or services provided, in respect of the production of any programme intended initially for broadcast on television

video game means any video recording that is designed for use wholly or principally as a game

video recording means any disc, magnetic tape, or solid state recording device containing information by the use of which 1 or more series of visual images may be produced electronically and shown as a moving picture.

Section 6(1)(d): added, on 30 October 2010, by section 4(1) of the Employment Relations (Film Production Work) Amendment Act 2010 (2010 No 120).

Section 6(1A): inserted, on 30 October 2010, by section 4(2) of the Employment Relations (Film Production Work) Amendment Act 2010 (2010 No 120).

Section 6(4): amended, on 16 November 2009, by section 173 of the Real Estate Agents Act 2008 (2008 No 66).

Section 6(7): added, on 30 October 2010, by section 4(3) of the Employment Relations (Film Production Work) Amendment Act 2010 (2010 No 120).

Annex Three: Talking points for your meeting with Uber

Introduction

- Thank you for taking the time to meet with me today and for providing me with Uber's proposed amendments to the *Employment Relations Act*.

General priorities

- The Government wants to restore business confidence and certainty. That is the way businesses are able to create more and better jobs.
- I believe workers and employers can agree on solutions that enable both to thrive.
- It is essential that the Employment Relations Act strikes the right balance between labour market and regulatory flexibility, certainty of obligations and outcomes, and protection for workers.

Contractors

- This Government wishes to ensure businesses and workers who explicitly agree to a contracting arrangement have certainty about the nature of that relationship.
- I have asked my officials for advice on policy options to increase certainty in contracting relationships, including your proposal.
- I expect my officials to engage with you on this work, at the appropriate time.
- The implications of the potential changes required to achieve this are significant, and will impact a range of working relationships across the New Zealand economy. They will need to be carefully considered.
- I am interested to hear the views of a wide range of stakeholders, including Uber, so I appreciate you meeting with me today.
- It would be great to hear more about Uber's views regarding what you would like the changes to the Employment Relations Act to achieve.

BRIEFING

Scope of policy work on the contractor/employee boundary

Date:	19 April 2024	**Priority:**	Medium
Security classification:	In Confidence	**Tracking number:**	2324-3050

Action sought		
	Action sought	**Deadline**
Hon Brooke van Velden **Minister for Workplace Relations and Safety**	Agree the scope of the policy work we will undertake on the contractor/employee boundary. Agree we may undertake early engagement with social partners and other key stakeholders to inform our work.	3 May 2024

Contact for telephone discussion (if required)				
Name	**Position**	**Telephone**		**1st contact**
Alison Marris	Manager, Employment Standards Policy	04 901 8564	Privacy	✓
Damian Zelas	Principal Policy Advisor, Employment Standards Policy	04 897 6365		

The following departments/agencies have been consulted

Minister's office to complete:

- ☐ Approved
- ☐ Noted
- ☐ Seen
- ☐ See Minister's Notes
- ☐ Declined
- ☐ Needs change
- ☐ Overtaken by Events
- ☐ Withdrawn

Comments

BRIEFING

Scope of policy work on the contractor/employee boundary

Date:	19 April 2024	**Priority:**	Medium
Security classification:	In Confidence	**Tracking number:**	2324-3050

Purpose

This briefing seeks your confirmation of the scope of our policy work on the contractor / employee boundary. This will contribute to the National and ACT coalition agreement and your priority to ensure businesses and workers who explicitly agree to a contracting[1] arrangement have certainty about the nature of that relationship.

We also seek your approval to engage with social partners and other key stakeholders to inform the early stage of this work.

Executive summary

We understand your policy objective for our work on the contractor/employee boundary is to increase certainty for parties in work-related contractual relationships, while minimising risks of exploitation. This briefing seeks your confirmation of this objective and agreement for the scope of our work.

There are a range of drivers of uncertainty in contractual relationships, including employment misclassified as contracting, ambiguous relationships that are difficult to classify, and contractors with low bargaining power (who may be unable to negotiate fair terms and conditions and have few effective protections under commercial law once they have entered into a contract).

Other drivers of uncertainty include the absence of a written record of the relationship, a lack of understanding of the difference between contracting and employment, industries where contracting arrangements are the default, and relationships which change over time.

There are typically about 18 cases considered each year by the Employment Relations Authority (ERA) and Employment Court (EC) involving the contractor/employee boundary. About half of these cases are found to be employees. However, it is likely that the true number of disputes will be larger.

The work we propose includes building a greater understanding of uncertainty and its impacts and drivers, identifying levers available that could increase certainty and developing policy options to include in advice to you. We would consider a range of legislative and non-legislative levers in your Workplace Relations and Safety (WRS) portfolio (discussed at paragraph 22). Our advice on potential options will include consideration of unintended impacts, including on worker protection, and how they could be mitigated.

Our primary focus is on the levers within your WRS portfolio. Confidential Advice

[1] In this paper "contracting" refers to a relationship characterised by a 'Contract for Services' and excludes other commercial arrangements for the supply of goods and services.

Next steps for this work, if you agree, include undertaking initial engagement with social partners and key stakeholders. Subject to your confirmation of the scope of our work, we expect to be able to brief you on policy options early in the July-September 2024 quarter.

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

a **Note** that there are a range of drivers of uncertainty in contractual relationships, including employment misclassified as contracting, ambiguous relationships and contractors with low bargaining power

Noted

b **Agree** that the objective for this work is to increase certainty for parties to a contract for services, while minimising risks of exploitation

Agree / Disagree

c **Note** that the ability of contractors with low bargaining power to challenge their employment status can both address and deter exploitation

Noted

d **Agree** that we develop both legislative and non-legislative options to give effect to this objective, utilising levers in your Workplace Relations and Safety portfolio

Agree / Disagree

e **Agree** that our primary focus should be on levers within your Workplace Relations and Safety portfolio, and initial advice should focus on this

Agree / Disagree

f **Indicate** the areas you would like us to explore:

Areas to explore	Decision
i. Potential changes to the statutory definition of 'employee', for example to alter the weight given to the various common law tests when the Employment Relations Authority and Employment Court assess employment status	*Agree / Disagree / Discuss*
ii. 'Carve outs' from the test of employment in section 6 of the Employment Relations Act 2000, such as are currently in place for screen production workers, real estate agents and sharemilkers	*Agree / Disagree / Discuss*
iii. Improving clarity and understanding among the parties of the different types of hiring arrangements and when they should be used and the importance of a suitable written agreement	*Agree / Disagree / Discuss*
iv. The potential for an increased role for less formal dispute resolution for contractors, such as mediation	*Agree / Disagree / Discuss*
v. Reducing incentives for hiring businesses to use contracting arrangements inappropriately	*Agree / Disagree / Discuss*
vi. Any additional areas not set out above	*Discuss*

g **Agree** that exploring levers outside your portfolio, such as protections for independent contractors in the Fair Trading Act (which sits in the Commerce and Consumer Affairs portfolio), will not be an area of focus during the initial phase of the project;

Confidential Advice

Agree / Disagree

h **Agree** that, as part of our initial focus on changes that can be made to existing settings within your portfolio, we do not explore the creation of a new regulatory regime for a third category of worker, which would be a significant shift in our settings, and that we can consider this after the initial phase of the project if needed

Agree / Disagree

i **Agree** we can engage with social partners and key stakeholders to inform the early stage of this work

Agree / Disagree

j **Note** that, subject to your confirmation of the scope of our work, our plan is to brief you on policy options early in the July-September 2024 quarter.

Noted

Alison Marris
Manager, Employment Standards Policy
Workplace Relations and Safety Policy, MBIE

19 / 04 / 2024

Hon Brooke van Velden
Minister for Workplace Relations and Safety

..... / ...... / 2024

Background

We understand the policy objective is to increase certainty for parties to a contract for services, while minimising risks of exploitation

1. Based on early discussions with your office regarding your priority to amend the *Employment Relations Act 2000* (the Act), we understand that:

    a. the underlying purpose of work on the contractor issue is to increase certainty for parties in work-related contractual relationships, and

    b. there is a recognition that complete certainty, ie an inability to challenge the nature of the contractual relationship, can create a risk of exploitation so our work should focus on achieving certainty, while considering options to mitigate the risks of exploitation.

2. This briefing seeks confirmation of the scope of the work, building on this initial feedback.

Employees and contractors have different rights and obligations, and operate under different legal frameworks

3. The two most common types of paid workers in New Zealand are employee[2] (under a contract **of** service); or contractor status (under a contract **for** services).[3]

The Employment Relations Act 2000 acknowledges that employees don't have equal bargaining power and gives them statutory protections

4. The Act is premised on the basis that there is unequal power in employment relationships. Section 3(a)(ii) sets out that one of its purposes is to acknowledge and address that inherent inequality of power.

5. Employees are also entitled to legislated minimum employment rights, including the right to: a written employment agreement; KiwiSaver contributions; be paid at least the minimum wage; annual and public holidays and sick leave; collectively bargain for wages and terms and conditions; and a fair and reasonable process if they are treated unfairly or lose their job through being fired or made redundant. Employees also have access to low-cost specialist dispute resolution through: mediation (accessible through Employment Services), the Labour Inspectorate, the ERA and EC.

The relationship between parties to a contract for services is set by commercial law, based on an assumption of equal bargaining power, with civil disputes resolution as a backstop

6. Contractors work under contract, commercial and competition laws. These include the *Fair Trading Act 1986* and the *Commerce Act 1986*, which prohibit unfair practices in business-to-business transactions. The *Contract and Commercial Law Act 2017* also provides some protection to parties to a contractual arrangement, such as when there may be a mistake in a contract, or when one party has been induced to enter into a contract by another party's misrepresentation.

7. Such disputes must be taken through the civil jurisdiction, which is expensive and can act as a barrier for some workers. Given its limited resources, the Commerce Commission only takes enforcement action for *Fair Trading Act* cases if it is in the public interest.

8. Contractors are in business on their own account and are engaged by a firm to provide services. They are responsible for paying their own tax and ACC levies and are not covered by most employment laws.[4] In return, contractors generally enjoy greater levels of flexibility

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[2] While employee status is defined in section 6 of the Employment Relations Act 2000, contractor status is not defined.
[3] A contract for services is sometimes known as an independent contractor agreement.
[4] Contractors are entitled to parental leave and health and safety protections.

and control than employees. They operate their own businesses, can work for multiple organisations, and decide how to do their work.

9. There are a number of reasons that businesses engage contractors. It may be their business model, or they may use contractors if they need a specialist skill or they only need help for a specific period.

Some workers hired under contracts for services don't have the equal bargaining power assumed by the commercial regulatory regime

10. The more 'light touch' regulatory settings for contractors can be mutually beneficial for both firms and contractors where bargaining power is relatively evenly balanced.[5] However, the commercial regulatory system is not designed to address inherent inequity in bargaining power like the employment relations and employment standards system is. Under the Act contractors, who consider their true relationship to be one of employment, may seek to confirm employment status in order to access employment rights.

11. The requirement in section 6 of the Act for the ERA and EC to "look through" the stated form of the relationship between a hiring business and a worker to assess its "real nature" serves a protective purpose, ensuring that a worker who is engaged in a way that is effectively employment, can access protections. The ERA and EC use four common law tests to assess employment status. These tests are described in **Annex one**.

12. There are a variety of reasons why a worker may be misclassified. These include a genuine mistake due to a misunderstanding of the law, the nature of the relationship evolving over time, and a deliberate decision to classify a worker as a contractor in order to avoid having to provide minimum employment entitlements.

13. The ability of workers hired on a contract for services to challenge their status can deter hiring businesses from deliberately misclassifying contractors, but can also generate uncertainty for businesses with a business model that involves hiring contractors.

14. Exploitation is complex and can take many forms, ranging from being paid less than the minimum wage, to being prevented from taking holidays as entitled.

In some cases the real nature of a working relationship may not be what is documented

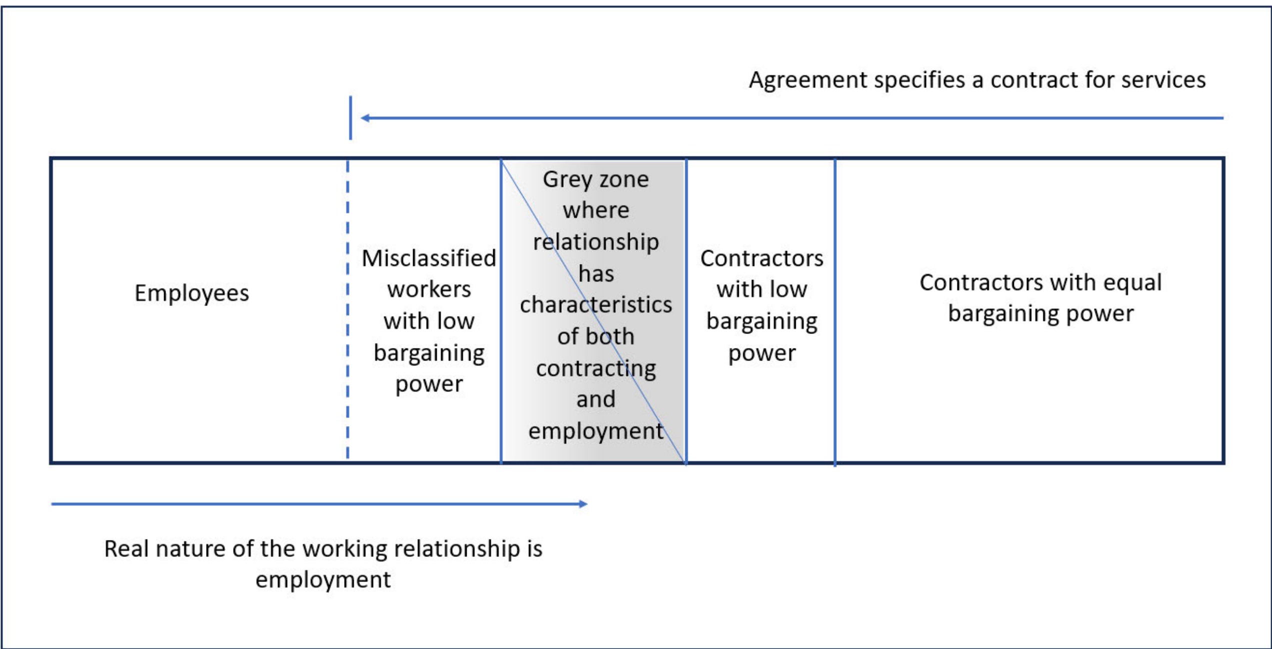
15. For the majority of contractors and employees the true nature of their employment relationship is well understood by both parties and aligns with the written form of the agreement. However, there are some situations in which employment status may not be clear. There may be no written agreement, or the written agreement may specify the relationship is one of a contract for services, but the reality could be different, creating uncertainty for both parties.

16. Commercial relationships are based on an assumption of equal bargaining power, but this is not always the case. Where workers have insufficient bargaining power to negotiate terms and conditions, or lack understanding of their legal options, they may accept a role as a contractor that is offered on a take-it-or-leave-it basis. Such workers may work in a low-skill, low-income occupation and/or may not understand the terms set out in the contract. The ability to challenge the real nature of their relationship provides them with some protection from exploitative situations.

17. Figure one below describes a continuum from employees through to contractors (whose bargaining power is equal to that of the hiring business). The three situations in the centre of this diagram may give rise to uncertainty, as described below at paragraph 18.

[5] Protections for contractors under the Fair Trading Act 1986, Commerce Act 1986 and Contract and Commercial Law Act 2017 were outlined in briefing 2324-1073, '*Issues related to the definition of employee*'.

Figure one: situations with uncertainty



18. There can be an incentive for workers to challenge their employment status in some of these situations:

    a. ***Misclassified workers*** – hired under a contract for services when the real nature of the relationship is employment. This may be due to a genuine misunderstanding of the relationship or the law, through to being a deliberate decision to try and reduce costs.

       An arguable example of misclassification was a 2015 case where the EC found that a cleaner misclassified as a contractor was actually an employee. The cleaner was required to wear a company uniform and drive a company-owned branded vehicle. Her hours were regular and largely determined by the cleaning company. The cleaner wanted to be an employee and didn't have a clear understanding of what it meant to be a contractor.

    b. ***Grey zone*** – workers hired as contractors whose relationship with the business has characteristics of both contracting and employment, so that it is difficult for all parties to classify, potentially leading to unintentional incorrect classification. This zone also includes situations where hiring businesses lack the capability to correctly classify and engage their workers.

       The current Uber drivers case is arguably an example of the inherent difficulty classifying workers in the grey zone.

    c. ***Contractors with low bargaining power*** – the underlying characteristic of the relationship is one of contracting, but the workers have insufficient bargaining power to negotiate fair terms and conditions. Such workers have few effective protections under commercial law once they have agreed to those terms. One potential protection is the unfair contract terms provisions in the *Fair Trading Act* which cover standard form small trade contracts. However, only the Commerce Commission can take action to stop a business using an unfair term in a small trade contract, and it has resource limitations. While employees with low bargaining power can improve their bargaining position by bargaining collectively, contractors are prohibited from collective bargaining by the anti-cartel provisions of the *Commerce Act*.

An example of contractors with low bargaining power is the "Fired Up Stilettos", who are seeking a route to challenge what they view as unfair terms and conditions, but do not want to become employees.

19. Other factors that may cause or exacerbate uncertainty include:

    a. situations where there is no written record, or a poor record, of the relationship between the hiring business and the worker

    b. industries where contracting arrangements are the norm and businesses may not turn their mind to whether it would be more appropriate to hire a particular worker as an employee

    c. the arrangement that works best for the hiring business has the characteristics of both contracting and employment

    d. hiring businesses structure the relationship as a contract for services initially, but then the relationship changes but the original relationship structure is not reviewed

    e. one or both parties to a contract for services may not understand the distinction between contracts for services and contracts of service.

Limited data is available about the size of the contractual uncertainty issue

20. Considering the number of paid workers in New Zealand, a relatively small number of disputes about the true nature of a relationship are considered by the ERA and EC each year. In the eight years 2016 to 2023 there were 137 cases in the ERA and nine in the EC. This is an average of 18 cases per year. About half the cases were found to be employees. However, it is likely that the number of disputes will be larger. This is because some parties may be able to resolve disputes themselves, while others may not be aware of the legal position or be able to afford to take their case to the ERA or EC.

We propose a scope of work to achieve the policy objective, by identifying options to increase certainty

21. We propose that your work on the policy objective to increase certainty for parties to a contract for services while minimising risks of exploitation, would broadly comprise:

    - building our understanding of the drivers of uncertainty and their impacts, including through engagement with social partners[6] and other key stakeholders who may have valuable insights
    - identifying ways to try and reduce uncertainty
    - developing a range of policy options and analysing these against agreed criteria to provide you with advice on possible policy solutions
    - providing advice to you on the options and next steps.

Your agreement is sought to confirm the scope of our work

22. Subject to your agreement, the scope of our work would include the development of policy options to increase certainty in work-related contractual relationships, including:

    a. potential changes to the statutory definition of 'employee', for example to alter the weight given to the various common law tests when the ERA and EC assess employment status

[6] Peak bodies representing business and unions and key stakeholders.

b. ‘carve outs’ from the test of employment in section 6 of the Act, such as are currently in place for screen production workers, real estate agents and sharemilkers, each of which have separate legislation covering how they contract

c. improving clarity and understanding among the parties of the different types of hiring arrangements and when they should be used and the importance of a suitable written agreement

d. the potential for an increased role for less formal dispute resolution for contractors, such as mediation

e. reducing incentives for hiring businesses to use contracting arrangements inappropriately.

23. Our advice to you on potential options will include consideration of unintended impacts, including on worker protection and incentives to hire, and how they could be mitigated.

We recommend that the work focuses on changes using the existing levers in your Workplace Relations and Safety portfolio

24. As mentioned earlier in this paper, additional levers also exist outside your portfolio, in the Commerce and Consumer Affairs portfolio, such as protections for independent contractors in the Fair Trading Act. These levers could provide alternative options for addressing the certainty objective, for example by improving protections for contractors it may be possible to reduce incentives for those workers to challenge their status in the ERA and EC.

25. We recommend that our primary focus be on the levers within your WRS portfolio. Confidential Advice

26. Another approach that, depending on settings, might span portfolios is the creation of a new regulatory regime for a third category of worker between employee and contractor. The United Kingdom has a regime of this kind. A third category of worker might reduce uncertainty by providing an alternative that is a better fit for some grey zone workers than just ‘employee’ or ‘contractor’. This would be a significant shift in our settings. We recommend that we initially provide you with advice based on changes to current settings, and we can discuss this further once we have done this.

Next steps: early engagement will help guide our work

27. This paper also seeks your approval for us to undertake engagement with social partners and key stakeholders to learn more about the drivers of uncertainty and the impacts for business and workers. This information will help us to refine a definition of the policy problem and guide the development of options.

28. The initial engagement we seek approval for now, would not replace engagement proposed for later this year, once policy options are developed.

Indicative timing for policy decisions on increasing certainty for contracting parties

29. Subject to your confirmation of the scope of our work, we expect to be able to brief you on policy options early in the July-September 2024 quarter.

Annex

Annex One: Common law tests of employment status

Annex One: Common law tests of employment status

Whether a worker is an employee or a contractor, depends on the real nature of the relationship they have with the firm that hires them. Over time, the courts have developed a series of tests to make decisions about employment status:

- **The intention test**: the type of relationship that the parties intended is relevant, but does not determine the true nature of the relationship on its own. Intention can normally be worked out from the wording in parties' written agreement (if there is one).

- **The control vs independence test**: the greater the control exercised over the worker's work content, hours and methods, the more likely it is that a person is an employee. A worker with greater freedom to choose who to work for, where to work, when to work, the tools used and so on, is more likely to be a contractor.

- **The integration test**: this looks at whether the work performed by a person is fundamental to the employer's business. The work performed by a contractor is normally only a supplementary part of the business.

- **The fundamental/economic reality test**: this looks at the total situation of the work relationship to determine its economic reality. A contractor is a person in business on their own account.

AIDE MEMOIRE

Meeting with Freightways on 16 May 2024

Date:	13 May 2024	**Priority:**	Medium
Security classification:	In Confidence	**Tracking number:**	2324-3323

Information for Minister
Hon Brooke van Velden **Minister for Workplace Relations and Safety**

Contact for telephone discussion (if required)				
Name	**Position**	**Telephone**		**1st contact**
Alison Marris	Manager, Employment Standards Policy	04 901 8564	Privacy	✓
Tim Spackman	Senior Policy Advisor, Employment Standards Policy	04 897 5059		

The following departments/agencies have been consulted
N/A

Minister's office to complete:

- ☐ Approved
- ☐ Declined
- ☐ Noted
- ☐ Needs change
- ☐ Seen
- ☐ Overtaken by Events
- ☐ See Minister's Notes
- ☐ Withdrawn

Comments

AIDE MEMOIRE

Meeting with Freightways on 16 May 2024

Date:	13 May 2024	**Priority:**	Medium
Security classification:	In Confidence	**Tracking number:**	2324-3323

Purpose

To provide background information and talking points to support your meeting with Freightways on Thursday 16 May 2024, at 9:00am.

Alison Marris
Manager, Employment Standards Policy
Labour, Science and Enterprise, MBIE

13 / 05 / 2024

Background

1. You have agreed to meet with Freightways on Thursday 16 May 2024, from 9:00am to 10:00am. Freightways will be represented by Mark Troughear, Chief Executive Officer; Ami Van Gils, Head of People and Culture; and Michael Claydon, General Manager Safety and Sustainability. Biographies of meeting attendees are provided in **Annex One**.

2. Freightways would like to discuss:
   - your priorities for the Workplace Relations and Safety portfolio
   - its approach to contracting and its Sustainability Earnings Index
   - its view on how to better handle exploitative models in the courier sector
   - opportunism from employment advocates seeking claims on companies and the unregulated conduct of advocates
   - its insights and suggestions for the Health and Safety system.

3. Talking points are provided in **Annex Two** to support your discussion.

Freightways owns multiple companies across four business sectors

4. Freightways is a New Zealand and Australia-based business, comprising express package and business mail services, temperature-controlled logistics, information management, and waste renewal services. It has been listed on the New Zealand stock exchange since 2003 and the Australian stock exchange since September 2023.

5. Among its subsidiaries, there are 10 express package delivery services including New Zealand Couriers, Post Haste, Sub60 and Kiwi Express in New Zealand, and Allied Express in Australia. Freightways uses a contracting model for its courier drivers.

Freightways has created its own Sustainability Earning Index

6. Freightways uses a Sustainability Earning Index for its courier drivers that aims to prevent exploitative working conditions and ensure fair payment. The index means drivers receive a minimum hourly rate after all reasonable costs. Freightways believes the vast majority of its couriers receive well above the minimum wage rate. Its index allows the contractors to deduct fuel, repairs and maintenance, and accountant's fees from their income, for tax purposes.

7. Freightways has stated that it wishes to ensure all contractors receive a fair pay, and believes the current models used by a small minority of its competitors can distort the competitive market, as companies who underpay and overwork their contractors are more able to charge lower prices.

8. Following the *Leota* case[1], in August 2021 the Labour Inspectorate investigated misclassification of employment status in the courier sector. Free and frank

Employment advocates are unregulated and encompass a range of employment law professionals

9. An employment advocate assists a party in an employment dispute and charges a fee for their services. The term 'employment advocate' covers a range of professionals; some have law degrees and have worked as lawyers, other advocates have experience in human resources or employment law sectors or are qualified mediators. They represent both workers and businesses and provide an alternative for parties that do not wish to engage a lawyer.

10. There is no regulating body for employment advocates. The Employment Law Institute of New Zealand (ELINZ) is a professional body for people working in employment advocacy and representation. ELINZ aims to upgrade professional standards and its members are bound by the ELINZ Code of Conduct.

Annexes

Annex One: Biographies of meeting attendees

Annex Two: Talking points for your meeting with Freightways

[1] In 2020, the Employment Court ruled that Mika Leota, a courier who Parcel Express considered a contractor, was in fact its employee.

Annex One: Biographies of meeting attendees

Mark Troughear
Chief Executive Officer

Mark became Chief Executive Officer in 2018 after working for Freightways since 1996.

He began working for New Zealand Couriers in sales and marketing before becoming General Manager of Post Haste in 2003.

In 2009 he became General Manager for Freightways overseeing the development of the Information Management Division.

Mark's experience includes sales management, brand development, managing operational units, mergers and acquisitions, developing emerging businesses and corporate oversight.

Ami Van Gils
Head of People and Culture

Ami became Head of People and Culture in March 2023.

Prior to joining Freightways, Ami worked for a number of multinational companies including Kuehne + Nagel and Deloitte.

Ami works across recruitment, talent and capability management, diversity and inclusion, wellbeing, learning and development, and remuneration.

Ami has a Bachelor's degree from the University of Auckland, majoring in Psychology.

Michael Claydon
General Manager Safety and Sustainability

Michael was appointed Freightways' Head of Safety and Sustainability in August 2020.

He was Regional Manager for Post Haste Group for five years, General Manger at Castle Parcels and Branch Manager at New Zealand Couriers.

Michael has 22 years of experience at Freightways and a degree in Applied Management majoring in Strategic Management.

He is Freightways' lead for sustainability and emissions.

Annex Two: Talking points for your meeting with Freightways

Your priorities for the Workplace Relations and Safety portfolio

- My intention is to restore business confidence and certainty.
- I have committed to increasing certainty for those in contracting relationships, reform health and safety law and regulations, and put in place measures of performance in frontline services. I have also committed to finally delivering on improving the Holidays Act.

Freightways' approach to contracting and its Sustainability Earnings Index

- I hear Freightways uses a Sustainability Earnings Index for its courier drivers. Can you tell me more about this and how it works?

Freightways' view on how to better handle exploitative models in the courier sector

- I understand Freightways wishes to ensure all contractors receive a fair pay and can run a sustainable business, but you feel this is not the case for all courier companies.
- Free and frank

Employment advocates

- Employment advocates represent about one-third of all employees in mediation.
- I would like to hear more about your experience with employment advocates in employment disputes.

Freightways' insights and suggestions about Health and Safety

- We need our health and safety system to be clear, to be understandable, and to be effective.
- Can you tell me about the aspects of your business that cause the biggest risk of harm to your workers, and how you manage these risks?
- Are there aspects of health and safety where you see opportunities to reduce compliance costs for businesses?

BRIEFING

Initial analysis of Proposal to put more weight on 'intention' when assessing employment status

Date:	7 June 2024	**Priority:**	High
Security classification:	In Confidence	**Tracking number:**	2324-3707

Action sought		
	Action sought	**Deadline**
Hon Brooke van Velden **Minister for Workplace Relations and Safety**	Note that we will develop potential options to meet the policy objective based on the Proposal in Annex One.	14 June 2024

Contact for telephone discussion (if required)				
Name	**Position**	**Telephone**		**1st contact**
Alison Marris	Manager, Employment Standards Policy	04 901 8564	Privacy	✓
Damian Zelas	Principal Policy Advisor, Employment Standards Policy	04 897 6365		

The following departments/agencies have been consulted

Minister's office to complete:

☐ Approved	☐ Declined
☐ Noted	☐ Needs change
☐ Seen	☐ Overtaken by Events
☐ See Minister's Notes	☐ Withdrawn

Comments

BRIEFING

Initial analysis of Proposal to put more weight on 'intention' when assessing employment status

Date:	7 June 2024	**Priority:**	High
Security classification:	In Confidence	**Tracking number:**	2324-3707

Purpose

This briefing responds to your request for advice at a meeting with officials on 27 May 2024, regarding the Proposal attached as **Annex One**. The advice in this briefing includes:

- how the Proposal would contribute to the objective "*to ensure parties to a contract for services have their original intentions upheld, while minimising risks of exploitation*"
- the implications of the Proposal for various contracting models
- our recommendation to focus future advice on options that amend the Proposal to increase its effectiveness in terms of the objective.

Executive summary

We have taken an initial look at the Proposal, described below and set out in **Annex One**, and analysed its likely effect with regard to the agreed policy objective "*to ensure parties to a contract for services have their original intentions upheld, while minimising risks of exploitation".*

The Proposal would establish an 'exclusion' from the statutory test of "employee" in section 6 of the Employment Relations Act 2000 (the Act), for businesses that hire one or more worker as an independent contractor. The hiring business must meet all of the following criteria:

- there is a written agreement between the hiring business and the worker that states the worker is an independent contractor and not an employee
- the worker is not restricted from working for another business while they are completing paid work for the hiring business
- the worker can determine their working hours and days
- the hiring business is unable to terminate the contract of the person for not accepting a specific task or engagement.

Workers hired by a business that considers it meets these criteria would be able to bring legal proceedings to challenge whether the four criteria are met. If the Employment Relations Authority (ERA) or Employment Court (EC) finds that the criteria are met, then the worker would be considered not to be an employee and would be unable to pursue further action via the ERA or EC. We consider that this would increase the likelihood of the initial intention of the parties at the time that the contract was entered into being upheld.

Workers hired by businesses that do not meet the criteria would continue to be able to test their employment status in the ERA or EC using the existing test, ie for them, the status quo would apply.

The exclusion would be available to all businesses, but in practice as currently drafted the selected criteria may limit its use. Further analysis and consultation is required to assess which contracting models and industries might be able to use the proposed exclusion.

The timeframes for this work and targeted consultation mean that we have to focus on identifying and analysing a small set of policy options that vary the criteria in the Proposal and could improve its effectiveness at meeting the policy objective.

As requested, we are working towards Cabinet policy decisions by the end of August 2024. To achieve this, we will provide you with a policy options paper by 11 July 2024.

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

a **Note** that the Proposal in Annex One would create a further 'exclusion' from the definition of employee in section 6 of the Employment Relations Act 2000 where, if the selected criteria have been found to be met, the worker will not be an employee and there is no scope for the Employment Relations Authority or Employment Court to apply common law tests for employee status

Noted

b **Note** that we will develop potential options for amending the Proposal to increase its effectiveness to meet the objective and we will also assess the types of contracting models and industries the options may apply to.

Noted

Alison Marris
Manager, Employment Standards Policy
Workplace Relations and Safety Policy, MBIE

07 / 06 / 2024

Hon Brooke van Velden
Minister for Workplace Relations and Safety

..... / ...... / ......

The policy objective

1. The agreed policy objective for this work is "*to ensure parties to a contract for services have their original intentions upheld, while minimising risks of exploitation.*

Our understanding of the Proposal has been determined from its drafting

2. At a meeting with officials on 27 May 2024, we offered to provide early advice on the Proposal in **Annex One** and the range of contracting situations it might apply to.

3. The Proposal is expressed as draft legislation. We have assessed what we understand the policy objective of the Proposal is, solely based on its wording. Any legislative amendment that results from this work will be drafted by the Parliamentary Counsel Office (PCO) based on drafting instructions prepared by MBIE's Legal team. As a result, a legislative amendment is unlikely to be worded exactly the same way as the Proposal.

4. The drafting appears to be based on an older version of the Act, prior to the passage of the Screen Industry Workers Act 2022. We have assumed that it is not the intention of the Proposal to reverse that Act.

The Proposal would create an 'exclusion' for hiring businesses that meet selected criteria

5. The Proposal would establish an 'exclusion' from the statutory test of "employee" in section 6 of the Act for businesses that hire one or more workers as an independent contractor. For this exclusion to apply, the hiring business would need to meet all of the following criteria:

    a. there is a written agreement between the hiring business and the worker that states the worker is an independent contractor and not an employee

    b. the worker is not restricted from working for another business while they are completing paid work for the hiring business

    c. the worker can determine their working hours and days

    d. the hiring business is unable to terminate the contract of the person for not accepting a specific task or engagement.

6. Workers hired by a business that considers it meets these criteria would be able to bring legal proceedings to challenge whether the four criteria are met. If the ERA or EC finds that the criteria are met, then the worker would be considered not to be an employee and would be unable to pursue any further issues via the ERA or EC.

7. As discussed with officials at the meeting on 27 May 2024, the Proposal as drafted would have retrospective effect. There is a high bar for retrospective legislation. We will address this point further in our future advice to you.

For businesses that meet the four criteria, intention would be given greater weight

8. The Proposal would be available for all businesses, if their business model meets the criteria. The proposed criteria would place a greater weight on intention than is the case currently under the common law test. This is because the ERA or EC would be limited to considering only the four criteria when determining the employment status of the worker. This would increase the likelihood of the initial intention of the parties at the time that the contract was entered into, being upheld. It would also provide certainty for businesses about the rules that they need to follow to utilise the exclusion.

However, if the criteria were not met, the usual common law test would apply

9. Workers hired by businesses that do not meet the criteria would continue to be able to test their employment status in the ERA or EC, ie for them, the status quo would apply. In this situation, the four common law tests outlined in **Annex Two** would be applied to assess the "real nature of the relationship" between the parties. The status quo may give less weight to intention than the proposed option, especially if the court considers that the relative bargaining power of the worker and hiring business are uneven.

Some contracting models would not meet the proposed criteria

10. The exclusion would be available to all businesses, but in practice as currently drafted the selected criteria may limit its use by businesses and/or industries with contracting models that do not meet the criteria. This could be the case, for example, for contracting arrangements where the hiring business exerts higher levels of control over the worker, such as by specifying when the worker must work.

11. Between 2016 and 2023 the top four industries with the greatest proportion of employment status cases in the ERA and EC were construction, service[1], transportation and hospitality. Further analysis and consultation is required to assess which contracting models and industries might be able to use the proposed exclusion.

Our advice will focus on potential amendments to the Proposal that could improve its effectiveness at meeting the policy objective

12. Our work is being guided by your commissioning received in response to our briefing *Scope of Policy Work on the contractor/employee boundary* [briefing 2324-3050 refers].

13. There are trade-offs between increasing the range of businesses that could benefit from the proposed exclusion from the common law test of employment status, and managing the risk of unforeseen impacts for businesses with specific contracting models and workers (refer to the section below on mitigating the risk of exploitation).

14. The timeframes for this work and targeted consultation mean that we have to focus on identifying and analysing a small set of policy options that vary the criteria in the Proposal and could improve its effectiveness at meeting the policy objective. Consultation helps to manage the risk that changes could have unintended consequences for some industries or businesses. Consulting more narrowly will impact our ability to manage this risk.

15. We are focusing on policy options that amend or build on the exclusion criteria in the Proposal. This includes developing advice on:

    a. a small set of options that increase or decrease the exclusion criteria and the types of contracting models/industries it may apply to, and

    b. ways to support the policy objective, including managing risks of increased exploitation (eg by adding requirements for good process, information provision or contract review).

16. We note that a narrower exclusion option (with a larger or more restrictive set of criteria that a business must satisfy) would help mitigate the risk of unintended consequences for industries with unique circumstances.

17. On the other hand, a wider exclusion option (with a smaller or less restrictive set of criteria that a business must satisfy) may increase the risk of workers, who are not genuinely in business for themselves, being denied the protections of the common law tests.

[1] The service industry includes: air conditioning, waste management, child minder, private home full-time caregiver, marketing, drain inspection, insurance operations, barber shop, pet caregiving and media-related operation.

18. The diagram in **Annex Three** shows a continuum of potential options, based on the weight they would give to intention. The focus of our advice will be to develop and analyse the options in the red box, based on the Proposal.

Potential alternative options that we are unable to adequately assess in the timeframe

19. There are other more significant changes to the employment relations and employment standards (ERES) system that could potentially achieve the intended policy objective. For example, options that would automatically apply to all businesses, such as increasing the weight on intention in section 6 of the Act for all workers in New Zealand.

20. Given the timeframes for this work, we do not consider we could adequately assess the impacts and risks associated with these types of fundamental change options. Amending the section 6 test of employment status for all groups in New Zealand would be a significant change to the current ERES system. It would need significant analysis and wide consultation to ensure the changes are appropriate, given the range of contracting approaches that exist in different industries, and to ensure it does not lead to negative outcomes like employers misclassifying workers as independent contractors to avoid the costs associated with employment.

Our options analysis will include a focus on mitigating the risk of increased exploitation

21. We understand the ‘minimising the risk of exploitation’ element of the policy objective to be relative to the status quo. That is, policy changes should be designed to increase the role of ‘intention’ in determining employment status, while minimising any resulting risks of significant negative impacts for workers.

22. Certain kinds of contractual relationships can be more likely to have negative impacts on workers. In a traditional business-to-business contracting arrangement, the assumption is that there is equal bargaining power and parties will only enter a contract if it is in their best interests, having weighed potential benefits and risks. If a risk eventuates and the contract is not profitable, either party can cut their losses and move on.

23. In other situations, where there is unequal bargaining power, the conditions of the contract might restrict the contractor’s ability to ‘cut their losses’ or to spread their risks across multiple contracts. At the moment there is no practical low-cost remedy available for contractors to pursue if they consider their contract is unfair.

24. Negative impacts for workers from policy changes could include an increased risk of:

    a. contract terms and conditions that, if considered by a court would be likely to be found to be unfair or unconscionable[2]

    b. contract-making processes where the worker does not understand the contract or does not have time to seek advice before signing

    c. businesses disguising and transferring their operating risks and costs to their workers, eg by not disclosing sufficient information to enable workers to make an informed assessment prior to agreeing to take on a contract

    d. misclassification of employment as an independent contractual relationship to deny workers employment entitlements that they would be legally entitled to (sham contracting)

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[2] The Fair Trading Act 1986 enables the Commerce Commission to apply to a court to declare a term in in a standard form trade contract to be an unfair contract term. This Act also prohibits unconscionable conduct in trade.

e. excessive use of control by the hiring business, so that the worker is effectively not in business for themselves.

25. When assessing options, our advice will look at whether options might increase the risk of these types of behaviours and whether there are mitigations that could be included to address such risks.

Next steps

26. We are working towards policy decisions by the end of August 2024. To achieve this, we will provide you with a policy options paper by 11 July for your decision by 17 July.

27. Our current focus includes identifying and analysing a small set of options based on the policy Proposal, as described in paragraph 14. We will prepare material for targeted consultation based on these options and provide them to your office.

Annex

Annex One: Proposed amendments to the Employment Relations Act 2000

Annex Two: Common law tests of employment status

Annex Three: Option set for further advice

Annex One: Proposed amendments to the Employment Relations Act 2000

The proposed amendments are set out in red font below:

6 Meaning of employee

(1) In this Act, unless the context otherwise requires, employee—

(a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and

(b) includes—

(i) a homeworker; or

(ii) a person intending to work; but

(c) excludes a volunteer who—

(i) does not expect to be rewarded for work to be performed as a volunteer; and

(ii) receives no reward for work performed as a volunteer; and

(d) excludes, in relation to a film production, any of the following persons:

(i) a person engaged in film production work as an actor, voice-over actor, stand-in, body double, stunt performer, extra, singer, musician, dancer, or entertainer:

(ii) a person engaged in film production work in any other capacity; and

(e) excludes a person, in circumstances where a business or undertaking:

(i) has a written agreement with the person which states that the person is an independent contractor and not an employee;

(ii) does not restrict the person from performing services or work for other businesses or undertakings, including competitors, or engaging in any other lawful occupation or work, except during the time from which the person commences a specified task or engagement offered by the business or undertaking until that task or engagement is completed;

(iii) does not require, as a condition of maintaining the engagement with the business or undertaking, the person to be available to perform tasks or other services on specific dates, or at specific times of day, or for a minimum number of hours;

(iv) does not terminate the contract of the person for not accepting a specific task or engagement offered by the business or undertaking.

(f) The exclusion specified in section 6(e) applies from the date that a person enters into an agreement with a business or undertaking as described in section 6(e) including any agreement entered into prior to the date of the commencement of this provision.

(1A) However, subsection (1)(d) does not apply if the person is a party to, or covered by, a written employment agreement that provides that the person is an employee.

(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2), the court or the Authority—

(a) must consider all relevant matters, including any matters that indicate the intention of the persons; and

(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

(4) Subsections (2) and (3) do not limit or affect the Real Estate Agents Act 2008 or the Sharemilking Agreements Act 1937.

(5) The court may, on the application of a union, a Labour Inspector, or 1 or more other persons, by order declare whether the person or persons named in the application are—

(a) employees under this Act; or

(b) employees or workers within the meaning of any of the Acts specified in section 223(1).

(6) The court must not make an order under subsection (5) in relation to a person unless—

(a) the person—

(i) is the applicant; or

(ii) has consented in writing to another person applying for the order; and

(b) the other person who is alleged to be the employer of the person is a party to the application or has an opportunity to be heard on the application.

(7) In this section,—

business or undertaking includes any business or undertaking, whether or not the business or undertaking is conducted for profit or gain, and whether alone or with others

film means a cinematograph film, a video recording, and any other material record of visual moving images

that is capable of being used for the subsequent display of those images; and includes any part of any film,

and any copy or part of a copy of the whole or any part of a film

film production means the production of a film or video game

film production work—

(a) means the following work performed, or services provided, in relation to a film production:

(i) work performed, or services provided, by an actor, voice-over actor, stand-in, body double, stunt performer, extra, singer, musician, dancer, or entertainer (whether as an individual or not):

(ii) pre-production work or services (whether on the set or off the set):

(iii) production work or services (whether on the set or off the set):

(iv) post-production work or services (whether on the set or off the set):

(v) promotional or advertising work or services (whether on the set or off the set) by a person referred to in subparagraphs (i) to (iv); but

(b) excludes work performed, or services provided, in respect of the production of any programme intended initially for broadcast on television video game means any video recording that is designed for use wholly or principally as a game video recording means any disc, magnetic tape, or solid state recording device containing information by the use of which 1 or more series of visual images may be produced electronically and shown as a moving picture.

Annex Two: Common law tests of employment status

Whether a worker is an employee or a contractor depends on the real nature of the relationship they have with the business that hires them. Over time, the courts have developed a series of tests to make decisions about employment status:

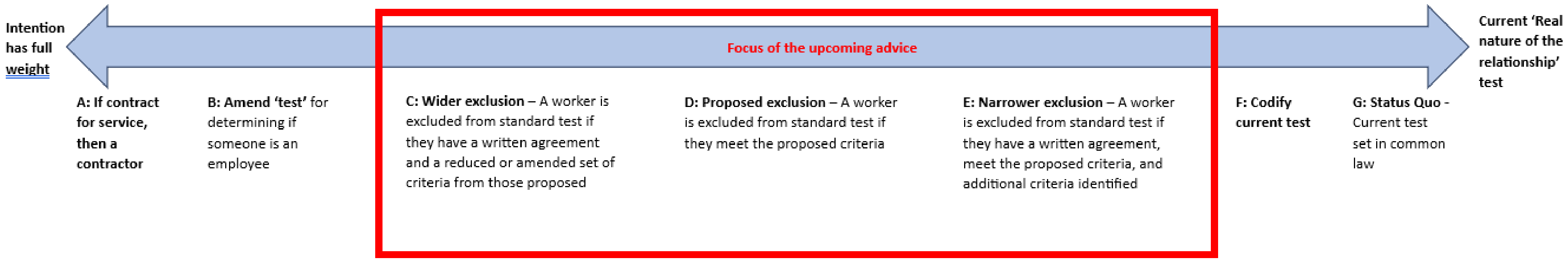
- **The intention test**: the type of relationship that the parties intended is relevant, but does not determine the true nature of the relationship on its own. Intention can normally be worked out from the wording in parties' written agreement (if there is one).
- **The control vs independence test**: the greater the control exercised over the worker's work content, hours and methods, the more likely it is that a person is an employee. A worker with greater freedom to choose who to work for, where to work, when to work, the tools used and so on, is more likely to be a contractor.
- **The integration test**: this looks at whether the work performed by a person is fundamental to the employer's business. The work performed by a contractor is normally only a supplementary part of the business.
- **The fundamental/economic reality test**: this looks at the total situation of the work relationship to determine its economic reality. A contractor is a person in business on their own account.

In common law assessments of employment status, these are not standalone tests. Section 6 of the Act requires that "the Court or the Authority (as the case may be) must determine the real nature of the relationship". The Employment Court has said, in applying the leading Supreme Court case, that a range of non-exhaustive common law tools may appropriately be deployed when determining the "real nature of the relationship" in any particular case. It emphasised the open-ended nature of the test.[3]

[3] E Tu Incorporated v Raiser Operations BV [2022] NZEmpC 192

Annex Three: Option set to be developed for further advice

Options to adjust the factors considered by the Employment Relations Authority and Employment Court, when deciding challenges to employment status



Options A, B, F and G would apply to all industries (ie they would involve the 'test' applied in all cases).

Options C, D and E are a type of exclusion where those that can met the conditions have a more limited set of things that the Employment Relations Authority and Employment Court can consider. The exclusion would be available to all industries, but their applicability would depend on the contracting model (ie some industries might not be able to meet the criteria).

PLUS: POTENTIAL ADDITIONAL REQUIREMENTS

1. **Include process requirements** – Process requirements could be considered to increase the likelihood that the worker understands what they are agreeing to (ie to ensure they intend to become a contractor). For example, a specified timeframe for considering the contract before signing and record keeping requirements.
2. **Include information requirements –** Information requirements could be considered to ensure a worker has adequate information when deciding whether to agree to a contract (eg, on the estimated income and expenditure, particularly if the contract requires capital investment).
3. **Include review requirements** – A requirement to review the written agreement after a set period could be included to ensure the written agreement remains up to date.

BRIEFING

Contractors – Options for an exclusion that gives more weight to intent

Date:	11 July 2024	**Priority:**	Urgent
Security classification:	In Confidence	**Tracking number:**	2324-3886

Action sought		
	Action sought	**Deadline**
Hon Brooke van Velden **Minister for Workplace Relations and Safety**	Decide the criteria for an exclusion to the statutory test of “employee.”	17 July 2024

Contact for telephone discussion (if required)				
Name	**Position**	**Telephone**		**1st contact**
Alison Marris	Manager, Employment Standards Policy	04 901 8564	Privacy	✓
Hannah Adams	Principal Policy Advisor, Employment Relations Policy	04 896 5262		
Charlotte de Feijter	Policy Team Leader, Employment Relations Policy	04 901 2009		

The following departments/agencies have been consulted
Inland Revenue and Ministry of Justice

Minister’s office to complete:

- ☐ Approved
- ☐ Declined
- ☐ Noted
- ☐ Needs change
- ☐ Seen
- ☐ Overtaken by Events
- ☐ See Minister’s Notes
- ☐ Withdrawn

Comments

BRIEFING

Contractors – Options for an exclusion that gives more weight to intent

Date:	11 July 2024	**Priority:**	Urgent
Security classification:	In Confidence	**Tracking number:**	2324-3886

Purpose

This briefing provides advice on the proposed option you asked us to consider, and possible amendments to that option for an exclusion from the statutory test of "employee" in section 6 of the Employment Relations Act 2000 (the Act).

Executive summary

The proposed option is to establish an exclusion from the statutory test of "employee" in section 6 of the *Employment Relations Act 2000* (the Act) for arrangements that meet all the specified criteria. The criteria in the proposed option are:

1. there is a written agreement that specifies the worker is an independent contractor; and
2. the worker is not restricted from working for others; and
3. the worker is not required to be available to work certain times, days or for a minimum period (availability criterion); and
4. the business does not terminate the agreement for not accepting an additional task.

The proposed exclusion is intended to provide a straightforward test for a subset of clear-cut genuine contracting arrangements. The proposed option (Option One) is not intended to capture all types of contracting models. In general, we expect that task-based platform work and product-focused contracts (ie where a worker is contracted to provide a product or deliverable by a specified date) would meet the criteria. We expect that a large proportion of contracting models would not be able to access the exclusion. If a working arrangement does not meet the exclusion criteria, that does not mean the worker meets the definition of an employee. This would be determined by the current section 6 test.

For businesses that have contracting arrangements that reflect the exclusion criteria, this would provide greater certainty that the intent that the worker is not an employee would be upheld if a worker challenged their status (compared to the current test). This would provide businesses with these types of contracting arrangements more confidence that they can continue to operate a contracting model. It would also enable them to offer other benefits to their contractors with less concern that it might impact the contractor's status. This increase in certainty is not, however, absolute as workers will continue to have the ability to challenge their status and there is still a risk that the Employment Relations Authority (ERA) or Employment Court (EC) could interpret the criteria more narrowly than intended.

The most significant unintended consequence we have identified for the proposed option is that it may be able to be used in situations that are currently casual employee relationships.

This paper provides you with options for narrowing or extending the applicability of the exclusion. It also includes options that would address the potential unintended consequence for casual employees. Each option presents its own set of trade-offs between the benefit of increased certainty for businesses, the scope of business models it applies to, and the potential for unintended consequences.

The main options considered are:

1. Option One: **The Proposed Option**
2. Option Two: **Include a fifth criterion that requires the worker to be able to sub-contact the work** – The exclusion would not be able to be used in situations that are currently casual employee relationships and the types of business models that could utilise the exclusion would be reduced.
3. Option Three: **Replace the availability criterion (criterion three) with a criterion that requires the worker be able to sub-contact the work** – The exclusion would not be able to be used in situations that are currently casual employee relationships but it would change the types of business models that would be able to utilise the exclusion and it is unclear how effective the sub-contracting criterion would be in limiting the exclusion to genuine contracting arrangements.
4. Option Four: **Amend the availability criterion (criterion three) so that it could be met if the worker is not required to be available to work OR the worker is able to sub-contract the work** - The types of business models that could utilise the exclusion would increase, but the exclusion may be able to be used in situations that are currently casual employee relationships and it is unclear how effective the sub-contracting criterion would be in limiting the exclusion to genuine contracting arrangements.

We consider the effectiveness of the exclusion (regardless of the option chosen) could be strengthened further if the criterion to have a written agreement included a requirement to include additional specified information (eg how tax and ACC levies will be paid).

There could also potentially be benefit in including a requirement that workers are given a reasonable opportunity to seek independent advice. We are unclear, however, whether this would have an impact in practice, and it could increase disputes.

The proposed option as drafted would apply retrospectively. Retrospective legislation can be justified if it is entirely for the benefit of those affected or is in the public interest. We do not consider this is the case, as the benefit of retrospectivity would accrue entirely to businesses.

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

a **Note** the analysis of the proposed option you asked us to consider has focused on the extent to which the option, or potential amendments to that option, would achieve the objective of ensuring parties to a contract for services have their original intentions upheld, while minimising risks of exploitation

Noted

b **Agree** to one of the following options for the exclusion criteria:

Option One: The criteria in the proposed option (which requires a written agreement that specifies the worker is an independent contractor, is not restricted from working for others; the worker is not required to be available to work certain times, days or for a minimum period, and that the business does not terminate the agreement for not accepting an additional task); OR	*Agree / Disagree*
Option Two: The criteria in the proposed option **plus a fifth criterion** that the worker can sub-contract the work; OR	*Agree / Disagree*

Option Three: The criteria in the proposed option but **replace** the 'availability criterion' in the proposed option with a requirement that the worker can sub-contract the work; OR	*Agree / Disagree*
Option Four: The criteria in the proposed option but amend the 'availability' criterion so it requires the business to **either** not require the worker to be available **OR** allow the worker to sub-contract	*Agree / Disagree*

c **Note** that Options Five to Eight (which are covered in the analysis) are not included in the option set up above, as they would not be effective in achieving the objective and/or have workability issues.

Noted

d **Agree** that the written agreement criterion also:

Option A: Specify a minimum set of provisions that the written agreement must include; AND/OR	*Agree / Disagree*
Option B: Require that the business provide the worker with reasonable time to seek independent advice.	*Agree / Disagree*

e **Agree** that the proposed option should not have retrospective application.

Agree / Disagree

Alison Marris
Manager, Employment Standards Policy
Workplace Relations and Safety Policy, MBIE

11 / 07 / 2024

Hon Brooke van Velden
Minister for Workplace Relations and Safety

..... / ...... / ......

Background

1. In response to a scoping briefing on contractors (refer briefing 2324-3050), you indicated that the policy objective for this work is “to ensure parties to a contract for services have their original intentions upheld, while minimising risks of exploitation”. In addition, you requested the advice focus on options that would “put more weight on the ‘intention’ factor in the common law test when assessing employment status” and provided an option which you asked us to assess against this objective (contained in **Annex One**).

2. The proposed option would establish an ‘exclusion’ from the statutory test of “employee” in section 6 of the *Employment Relations Act 2000* (the Act) for contracting arrangements that met the specified criteria. This would only apply to a subset of contracting arrangements. For arrangements that do not meet those criteria, the Employment Relations Authority (ERA) or Employment Court (EC) would still be able to apply the existing ‘real nature of the relationship test’ to determine whether the worker was an employee or not.

3. On 7 June 2024, we provided initial advice on how the proposed option would contribute to the policy objective for those situations that fit the exclusion criteria. Given the short timeframe for advice and engagement, we indicated that the options analysis advice would focus on identifying and analysing a small set of policy options that vary the criteria in the proposed option (refer briefing 2324-3707).

4. You have indicated you are interested in options that would drive change in this area. As such, the status quo is not included as an option in the option set. In the regulatory impact statement (RIS), however, MBIE is required to consider the net benefits of the change relative to the status quo (ie compared to where the existing ‘real nature of the relationship test’ is used whenever a worker challenges their employee status). MBIE is still completing this analysis. We will let you know the outcome of the RIS analysis as soon as we have worked this through.

The intended effect of the proposed option is to provide a straightforward test for a subset of contracting arrangements

5. The proposed option was provided in the form of draft legislation (refer **Annex One**). **Annex Two** sets out refinements to the criteria to focus on what we consider to be the intended policy.

6. Over time, the courts have developed four interrelated tests to provide natural justice for applicants when making decisions about whether the real nature of the relationship between a worker and a business is one of employment, by balancing the intention of the parties with a broad assessment of “all relevant matters”.

7. When the relationship is a genuine contracting relationship, challenges are costly to both workers and businesses, possibly impacting business viability so could disincentivise businesses from offering jobs and benefits to workers. These costs from actual or potential challenges could be reduced through an exclusion mechanism to give greater weight to intention in genuine contracting relationships. The intended effect of the exclusion criteria (taken as a set) is to provide a straightforward test for the subset of arrangements that have characteristics indicative of a genuine contacting relationship.

8. Table One sets out the intended effect is for each of the criteria in the proposed option.

Table One: Intended effect for the exclusion criterion in the proposed option

Criteria	Intended effect
Intent criterion (6(1)(e)(i)) Have a written agreement with the worker that specifies they are an independent contractor rather than an employee	Requiring a written agreement that specifies the intended nature of the relationship (that it is not one of employment) would help to ensure that both parties understand the nature of the arrangement they are agreeing to and provide a signal of agreed intent. The wording in this criterion would need to be amended to avoid the need to define a 'contractor' in the employment legislation. On page 11, we have also considered options for requiring further information be included in the written agreement to ensure the worker understands what they are agreeing to.
Restriction criterion (6(1)(e)(ii)) Does not restrict the worker from working for another business (including competitors), except while they are completing paid work for the hirer	This criterion supports freedom of contracting by ensuring the worker is free to decide who to perform tasks/provide services for, including being able to work for competitors (noting, there can still be requirements in relation to the confidentially of information). This does not mean, however, that the business must restrict the worker from performing tasks for another business when they are performing tasks for them, but that they can restrict this (where appropriate) and still comply with this criterion. If the worker chooses to accept several tasks from one business, resulting in them working full-time for that business, that may still meet this criterion. However, if the requirements of the contract mean it is not practical for them to work for anyone else (eg the contract requires full time work) that may result in the courts determining this criterion has not been met.
Availability criterion (6(1)(e)(iii)) Does not require the worker to be available to work on specific times of day or days, or for a minimum number of hours.	This criterion protects the worker's freedom to decide when they perform the work. This is an important distinguishing control element[1] between employment relationships and contacting arrangements. If the contract requires the worker to perform the task on a specified day, even if they have some flexibility on what time of day they do it, it would not meet this criterion. For gig-based contracts involving short-term tasks, this means the worker can choose when they accept these tasks. Other types of contracts could still include an agreed date for the project to be delivered. However, to meet the criterion, it must be up to the worker to determine when they work to produce the product/deliverable by the agreed date. If the due date, or other contracting requirements, mean the worker must be available (and the worker cannot determine this) to work specific times to deliver the project, that would not meet this criterion.

[1] The current real nature of the relationship test includes four tests: The intention test, the control vs independence test (a worker with greater freedom over who to work for, when, how and where they work is more likely to be a contractor), the integration test (work performed by a contractor is generally only a supplementary part of the business), and the fundamental/economic reality test (a contractor is person in business on their own account).

Termination criterion (6(1)(e)(iv)) The hiring business does not terminate the contract for not accepting an additional specific task or engagement offered (beyond what they have already agreed to do under the existing contract).	This criterion supports freedom of contracting by ensuring the worker is free to decide whether a particular task would be profitable for them to perform. The practical impact of this criterion may be low, however, as the worker would need to prove the termination was as the result of them not accepting an additional task, as opposed to another reason. If an employer does not terminate a contract but stops offering work that was usually offered under that contract because the worker did not accept an additional task, it would be possible for the Court to consider whether this means the contract has been effectively terminated (subject to proof of the reason for the termination being established to the satisfaction of the Court).

Options analysis

9. Our analysis has focused on the proposed option and possible amendments to that option (refer briefing 2324-3707).

10. **Annex Three** contains an analysis of eight options that would widen, limit, or change the types of contracting arrangements that could utilise the exclusion. The main four options we recommend you consider are:

    a. Option One: The Proposed Option

    b. Option Two: Include a fifth criterion that requires the worker to be able to sub-contact the work

    c. Option Three: Replace the availability criterion with a criterion requiring that the worker is able to sub-contact the work

    d. Option Four: Amend the availability criterion so that it could be met if the worker is not required to be available to work OR the worker is able to sub-contract the work.

11. We assessed the options against the following criteria:

    a. Effectiveness of ensuring parties to a contract for services have their original intentions upheld by placing greater weight on intention

    b. Effectiveness of minimising risks of exploitation

    c. Workability, implementation, cost, or other considerations (including potential benefits or risks not directly related to the objective)

    d. Implications for domestic obligations (Human Rights and Bill of Rights Act).

There would be greater weight on intent and certainty for those that meet the criteria

12. The exclusion criteria in the proposed option (Option One) would provide a mechanism for contracting arrangements that meet the criteria (where there is agreement and a high degree of flexibility) to be filtered out of the employment relations and employment standards system. These arrangements would, therefore, not be subject to the full 'real nature of the relationship' test in section 6 of the Act.

13. For businesses that have contracting arrangements that reflect the exclusion criteria, the smaller set of factors that could be considered if a worker challenged their status, would provide greater certainty that the intent for the worker to be an independent contractor would

be upheld. This will be particularly relevant for businesses that are expected to meet these criteria but where uncertainty regarding the status of their workers has called into question whether their business models can continue to operate (eg platform-based models such as Uber).

14. These businesses will also be able to offer benefits to their workers without it creating a risk that if the worker challenged their status, the provision of those benefits could impact the assessment of the worker's status.

15. The proposed option will encourage businesses that have contracting arrangements that meet the characteristics of the exclusion criteria to have a written agreement. This will promote a clearer understanding at the start of the relationship regarding the intended type of working relationship.

16. Even with the inclusion of a clearer set of exclusion criteria, there is still a risk that the ERA or EC could interpret the criteria more narrowly than intended. If Cabinet approves the proposed approach, we will work with the Parliamentary Counsel Office to ensure the criteria are as clear as possible, but it would not be possible to completely mitigate this risk.

The proposed option may enable businesses to offer some roles as a contracting arrangement that are currently considered an employee relationship

17. The requirements of the criteria in the proposed option mean that a large proportion of contracting models would not meet the criteria for the exclusion. There was no available data to enable us to determine the percentage of contracting arrangements that would be able to utilise the proposed option (or the other options considered). In general, we expect that task-based platform work and product-focused contracts (ie where contracted to provide a product or deliverable by a specified date) would meet the criteria in the proposed option. **Annex Four** provides examples of the types of contracting arrangements that would be likely or unlikely to meet the exclusion criteria.

18. While the criteria in the proposed option are intended to limit the applicability of the exclusion to situations that are genuine contracting relationships, it could be used in situations that are currently structured as employment relationships. In particular, casual employment relationships would be likely to meet the three substantive exclusion criteria (two to four[2]), as casual employees generally have flexibility to choose when they accept work and cannot be required to be available to accept work at a particular time. Just over 4% of employees in New Zealand are casual employees[3].

19. In the timeframes available, we have been unable to work out a way to amend the framing of the criteria in the proposed option so that it would not apply to casual employees. The potential unintended consequence is that employers of casual employees change their hiring practices to fit within the exclusion and therefore move outside of the employment system. The size and significance of this issue depends largely on how the labour market responds if this option is implemented. Table two sets out two options that could address this.

[2] Criterion 2: The worker is not restricted from working for others; Criterion 3: The worker is not required to be available to work certain times, days or for a minimum period (availability criterion); and Criterion 4: The business does not terminate the agreement for not accepting an additional task.

[3] StatsNZ Household Labour Force Survey, March 2024.

Table Two: Summary of the analysis of options that could address the potential issue in relation to casual employees

Option	Summary of analysis
Option Two - Add a fifth criterion that requires the worker to be able to sub-contract the work (sub-contracting criterion)	The addition of this criterion would target the exclusion to very clear-cut contracting arrangements (eg where a product is being delivered without any controls over when and who is delivering it). Casual employment arrangements would not be expected to meet this criterion, as those agreements are specific to a particular worker. The additional criterion would reduce the types of business models that could utilise the exclusion. This reduction would include some business models potentially considered to be clear cut contracting arrangements (eg contracting arrangements that require a particular worker, given their qualifications, to deliver the product) and some business models that have raised concerns regarding the status of their workers (eg platform models). The narrowness of the applicability of the exclusion would, therefore, limit the effectiveness of the exclusion in terms of the objective of ensuring parties to a contract for services have their original intentions upheld.
Option Three - Replace the availability criterion with the sub-contracting criterion	Replacing the availability criterion with a sub-contracting criterion would be another way to differentiate the contracting models the exclusion would apply to from employee relationships. This wouldn't necessarily reduce the types of contracting models that could utilise the exclusion but would change the business models that the exclusion applies to. For example, the types of platform models that would meet the criteria in the proposed option would be unlikely to meet this criterion (eg Uber, as drivers are unable to subcontract the rides they accept). However, some courier/mail delivery contracting models may be able to meet the criteria (ie those that allow sub-contracting and for the worker holding the contract to provide services for other businesses)[4]. It is unclear whether a sub-contracting criterion would be effective (in the absence of the availability criterion) in limiting the exclusion to genuine contracting arrangements. Confidential Advice

20. As part of the options analysis, we also considered options that included additional criterion to further reduce the potential risks of exploitation. These options would reduce the types of business models that could utilise the exclusion and have practical or implementation issues (refer to options seven and eight in **Annex Three**).

[4] Courier/mail delivery contracting models that require the worker holding the contract to not work for other businesses would not meet the exclusion criteria in this option.

Widening the exclusion would risk it being applicable in situations that are not genuine contacting arrangements

21. You asked us to consider whether there were amendments to the proposed option that could help ensure the exclusion would apply to a range of contracting situations.

22. The availability criterion (ie the business does not require the worker to be available to work specific times, days or minimum hours) would have the biggest impact on the types of business models that could utilise the exclusion. We considered options that would widen the applicability of the exclusion by amending or replacing the available criterion. For all of these options there is an increased risk that the exclusion could be used in situations that are not genuine contracting arrangements.

23. Table Three contains a summary of the analysis of those options.

Table Three: Summary of the analysis of options that would widen the exclusion

Option	Summary of analysis
Four - Amend the availability criterion (criterion three) so that it could be met if the worker is not required to be available to work **OR** the worker is able to sub-contract the work.	A broader range of contracting arrangements could benefit from the exclusion, as it would include the types of business models that could utilise the exclusion in both the Proposed Option and Option Three. This would increase the types of business models that would have more weight given to intention. It would also, however, combine the risks associated with both the Proposed Option and Option Three, as it: 24. could be used in situations that are currently casual employee relationships, and 25. is unclear how effective the sub-contracting criterion would be in limiting the exclusion to genuine contracting arrangements Confidential Advice It is difficult to quantity these risks as it depends on how the labour market responds.
Five - Amend the availability criterion (criterion three) so that it could be met if the worker is not required to be available to work **OR** the worker is able to set their own rate	This would enable the exclusion to be used in situations where the business needs to have the work provided at certain times or days, but only where the contractor has high bargaining power. There is, however, a risk of gaming, as its unclear what would be required to demonstrate the worker had 'set their own rates'. Potential unintended consequences for casual employees could still occur under this option. If used as intended (ie where the worker has high bargaining power) the impact on the objective is expected to be low as the Courts already generally give greater weight to intention in those situations.

Confidential Advice

Confidential Advice and International Relations

Potential additional requirements

26. The effectiveness of all the options could be strengthened by including additional requirements in relation to the written agreement.

27. The information and process options below could be included as part of the criterion requiring a written agreement. The options can be combined or stand alone.

Option A: Specify a minimum set of provisions that the written agreement must include (recommended)

28. The criterion requiring a written agreement could be a further strengthened by a requirement to include specified terms to help ensure the worker has a clear understanding of what they are agreeing to. The requirements would impact whether the exclusion criteria are met, not the validity of the contract. Any requirements would need to be consistent with contracting law.

29. The main risk of this requirement is that a business could be determined to not be within the exclusion because they did not adequately include one or more of these provisions in the agreement, even if the arrangement itself meets the substantive criteria of the exclusion. The more provisions required, the more likely it would be that businesses would need to update existing contracts to comply. We consider the benefits to both contracting parties of having a written contract that includes key provisions outweigh this risk.

30. If you agree to include additional information requirements as part of the criterion to have a written agreement, the Cabinet paper would seek delegated authority for you to decide what the specified provisions would be as part of the drafting process. The required provisions could include ones focused on the implications of being an independent contractor (eg that they will not have access to full employee entitlements and are responsible for paying their own tax and ACC levies) or that relate to the arrangements being agreed to (eg any liabilities for damage or failure to meet targets or the payment and payment method and timing).

Option B: Provide reasonable time to seek advice

31. This option would require the business to give the worker a reasonable opportunity to seek that advice. The inclusion of such a requirement should require businesses that meet the main set of criteria to ensure they provide the opportunity to seek advice, if they wished to rely on the exclusion.

32. This requirement would increase the potential for disputes regarding whether the exclusion criteria was met. It could also be seen as an overstep in terms of the scope of the *Employment Relations Act 2000,* as the requirements are in relate to the process for agreeing a contracting arrangement, not an employment agreement.

Summary of stakeholder comment on proposed option and potential amendments

33. We consulted with a targeted set of stakeholders on their view of the proposed option, including potential impacts.

34. Feedback was mixed. Stakeholders including BusinessNZ, Uber and the Employers and Manufacturers Association (EMA) supported the proposed option. The New Zealand Council of Trade Unions (CTU) and Prodrive did not support the proposed option. Table Four provides a high-level summary of the stakeholder views.

Table Four: Stakeholder views of the proposed option

Stakeholder group	Views
Business stakeholders	Retail NZ and NZ Post considered that it would be difficult for their business models to meet the availability criterion. Freightways and NZ Post considered that the availability criterion should be amended to include an alternative where a business could still meet the exclusion if the worker was able to sub-contract the work. Some stakeholders queried the operation of the criteria in practice. For example, while a business may not be able to terminate a contract if a worker did not take on a task, would the exclusion still apply if they were subject to other disadvantageous consequences? Uber wanted to ensure that, where a business met the availability criterion, they could continue to offer incentives.
The CTU, CTU Affiliates and Prodrive	The CTU supported the recommendations of the Tripartite Working Group on Better Protections for Vulnerable Contractors. They saw a clear risk that casual employment relationships could be captured by the exclusion. CTU and its affiliates that we met with considered that other criteria could better capture genuine contracting relationships, such as whether the contractor had the ability to add value to their business, whether the work could be sub-contracted or whether the work was being conducted independently. Unite union also considered that situations where a contractor would effectively earn below the minimum wage (after expenses) should always be considered under the full test to help prevent exploitation. Prodrive did not support legislative change that increased the weight of intention without providing measures that would result in more equity in the relationship between the business and the worker.
Employment lawyers and the Prejudice supply of information	Litigation could be increased by having two tests that could be challenged in relation to an employment status decision. Businesses would want to change their model to meet the exclusion but many could struggle to meet the availability criterion. It would be difficult for a worker to prove it if they thought that a 'no-fault termination' contract had been terminated because the worker did not agree to take on a task.

35. A number of stakeholders considered that the proposed option increased the risk of exploitation and could exacerbate any power imbalance in the relationship. BusinessNZ, employment lawyers, Prodrive, the CTU, Unite union and Prejudice supply of information

Prejudice supply of information considered that process and information provisions should be included to help mitigate this (eg a requirement for the worker to obtain independent legal advice and providing information on the implications of being an independent contractor). The CTU and employment lawyers mentioned that if a worker had literacy issues, or English as a second language, these provisions may not be effective at helping to prevent exploitation.

A retrospective application is not justified

36. The proposed option provided in draft legislation includes the retrospective application of the legislation to any agreement entered into, as described in the exclusion, prior to commencement. While Parliament can make retrospective legislation, Legislation Design Advisory Committee (LDAC) guidelines state that:

    a. the default setting is that law is prospective and applies from the date of enactment, not to events that took place before that date

    b. there is a strong convention that legislation should not interfere with cases before the court and should not deprive individuals of their right to continue proceedings under old law

    c. retrospective legislation can be justified if it is entirely for the benefit of those affected or is considered to be in the public interest.

37. Once legislation to implement the proposed option was introduced, this would provide notice of the proposed legislative change. Accordingly, there is the potential for a number of claims to be filed for employee status until the Bill was passed. These claims would be considered under the old law. If a claimant was found to be an employee, they could receive compensation for any minimum entitlements owed up until the time of commencement (if it was decided that post-commencement they were contractors as they came under the exclusion).

38. We consider that it would be difficult to justify retrospective application of the exclusion because it could result in some uncertainty and potential cost for business. The benefit of retrospectivity would accrue entirely to business. There would be a commensurate loss of rights for potential claimants for their case to be decided under the law as it stood when they filed their claim. We also do not consider there is any wider public interest in the retrospective application of the exclusion. Accordingly, we do not consider that the exclusion should have retrospective effect. If you would like to consider retrospective application further, we can explore this in consultation with LDAC.

International relations.

International relations.

Potential taxation implications

43. A taxpayer's obligations depend on whether they are an employee or contractor, which is determined by the Income Tax Act 2007, and this refers to common law. Inland Revenue follows common law decisions and makes their own determination about whether a person is an employee or contractor. The definition of employee in section 6 of the Employment Relations Act 2000 does not affect the interpretation of "employee" in the Income Tax Act 2007, although case law can be relevant to the extent that those decisions concern the common law tests.

44. As outlined above there is a risk that some businesses may decide to change roles that are currently employees to contractors if they consider they can meet the exclusion. If an exclusion is created, it should not have any significant tax implications. As the tax status depends on common law tests this is unlikely to change the tax status of those employees unless there is specific linkage between the proposed exclusion and the tax status of a person.

Te Tiriti and population implications

45. The Cabinet paper template requires an analysis of Te Tiriti and population implications. Due to the timeframes to prepare the advice, we have not had the opportunity to consult stakeholders on the Te Tiriti implications of implementing the proposed option. **Annex Five** sets out our view of the based on the limited information available. **Annex Five** also contains our view of the population implications.

Bill of Rights implications

46. Section 27(1) of the New Zealand Bill of Rights Act 1990 (NZBORA) affirms that a person has the right to observance of the principles of natural justice, where a tribunal or authority is determining their rights, obligations, or interests. Amending the Employment Relations Act 2000 to include an exclusion that impacts what the ERA/EC can consider when an employee challenges their status could impact that right. However, as the worker can continue to be heard under the proposal (eg to put forward their views and have those views considered) in relation to decisions about whether they are an employee then the risk of this amendment creating a significant natural justice issue appears to be low.

47. Any Bill resulting from any chosen option will be assessed for consistency with NZBORA before introduction.

Stakeholders raised other considerations that are beyond the scope of the option being considered here

48. Should the options discussed in this briefing be agreed to by you and progressed through the amendments to the Employment Relations Act next year, there would need to be an update

to the Employment New Zealand guidance on ‘what’s an employee’ and the employment agreement builder would need to be updated too.

49. In addition to the views summarised in Table Four above, stakeholders raised three interrelated issues that fall within contract, commercial and competition laws, as opposed to employment law:

- The potential for hidden or high set-up costs of working as a contractor - contractors buy and use their own equipment;
- Unclear or uncertain contract terms which add to the risks and compliance costs associated with working as a contractor – tax, ACC and Health and Safety compliance costs;
- Unfair terms and conditions for contractors with low-bargaining power – contractors are restricted from collective bargaining and the dispute resolution system for contractors is difficult to access.

50. The process and information requirements listed above could potentially help with concerns raised in the first two bullets. Some stakeholders suggested that MBIE could go further by developing a “contract builder”, similar to the employment agreement builder on business.govt.nz. We considered this option but given the range of contracting arrangements, it would be impossible to standardise a “contract builder” that would continue to support the innovation and flexibility associated with business-to-business relationships. Any new agreement builder would require new capital funding and on-going operating funding to maintain.

51. Officials could be available to discuss any of the feedback raised by stakeholders in relation to the contract builders or options within the contract, commercial and competition laws, if requested.

Next steps

52. For a paper to be considered by Cabinet by the end of August we are working to the following timeframes:

Step	Date
Minister decisions on policy options paper	By 17 July
Draft Cabinet paper provided to Minister	31 July
Ministerial and Departmental consultation on Cab paper [5 working days is the minimum for Ministerial consultation]	5 - 9 August [sitting week]
Final Cabinet paper and RIS provided to Minister’s office	By 12 August
Lodge Cabinet paper and RIS	15 August
Cabinet Economic Policy Committee considers paper and RIS	21 August
Cabinet decisions	26 August

Annexes

Annex One: Proposed option

Annex Two: Refinements to the criteria to focus on the intended policy.

Annex Three: Analysis of options

Annex Four: Examples of different business models within industries that would meet the criteria of the proposed option

Annex Five: Te Tiriti and population implications

Annex One: Proposed option

PROPOSED AMENDMENTS TO EMPLOYMENT RELATIONS ACT

The proposed amendments are set out in red font below:

6 Meaning of employee

(1) In this Act, unless the context otherwise requires, employee—

(a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and

(b) includes—

(i) a homeworker; or

(ii) a person intending to work; but

(c) excludes a volunteer who—

(i) does not expect to be rewarded for work to be performed as a volunteer; and

(ii) receives no reward for work performed as a volunteer; and

(d) excludes, in relation to a film production, any of the following persons:

(i) a person engaged in film production work as an actor, voice-over actor, stand-in, body double, stunt performer, extra, singer, musician, dancer, or entertainer:

(ii) a person engaged in film production work in any other capacity; and

(e) excludes a person, in circumstances where a business or undertaking:

(i) has a written agreement with the person which states that the person is an independent contractor and not an employee;

(ii) does not restrict the person from performing services or work for other businesses or undertakings, including competitors, or engaging in any other lawful occupation or work, except during the time from which the person commences a specified task or engagement offered by the business or undertaking until that task or engagement is completed;

(iii) does not require, as a condition of maintaining the engagement with the business or undertaking, the person to be available to perform tasks or other services on specific dates, or at specific times of day, or for a minimum number of hours;

(iv) does not terminate the contract of the person for not accepting a specific task or engagement offered by the business or undertaking.

(f) The exclusion specified in section 6(e) applies from the date that a person enters into an agreement with a business or undertaking as described in section 6(e) including any agreement entered into prior to the date of the commencement of this provision.

(1A) However, subsection (1)(d) does not apply if the person is a party to, or covered by, a written employment agreement that provides that the person is an employee.

(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2), the court or the Authority—

(a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

(4) Subsections (2) and (3) do not limit or affect the Real Estate Agents Act 2008 or the Sharemilking Agreements Act 1937.

(5) The court may, on the application of a union, a Labour Inspector, or 1 or more other persons, by order declare whether the person or persons named in the application are—
(a) employees under this Act; or
(b) employees or workers within the meaning of any of the Acts specified in section 223(1).

(6) The court must not make an order under subsection (5) in relation to a person unless—
(a) the person—
(i) is the applicant; or
(ii) has consented in writing to another person applying for the order; and
(b) the other person who is alleged to be the employer of the person is a party to the application or has an opportunity to be heard on the application.

(7) In this section,—

business or undertaking includes any business or undertaking, whether or not the business or undertaking is conducted for profit or gain, and whether alone or with others

film means a cinematograph film, a video recording, and any other material record of visual moving images that is capable of being used for the subsequent display of those images; and includes any part of any film, and any copy or part of a copy of the whole or any part of a film

film production means the production of a film or video game

film production work—

(a) means the following work performed, or services provided, in relation to a film production:
(i) work performed, or services provided, by an actor, voice-over actor, stand-in, body double, stunt performer, extra, singer, musician, dancer, or entertainer (whether as an individual or not):
(ii) pre-production work or services (whether on the set or off the set):
(iii) production work or services (whether on the set or off the set):
(iv) post-production work or services (whether on the set or off the set):
(v) promotional or advertising work or services (whether on the set or off the set) by a person referred to in subparagraphs (i) to (iv); but

(b) excludes work performed, or services provided, in respect of the production of any programme intended initially for broadcast on television

video game means any video recording that is designed for use wholly or principally as a game

video recording means any disc, magnetic tape, or solid state recording device containing information by the use of which 1 or more series of visual images may be produced electronically and shown as a moving picture.

Annex Two - Refinements to the criteria to focus on the intended policy

We have refined the criteria in the proposed option, based on what we consider to be the intended policy effect, to clarify how the criteria would apply in different types of contracting models.

Criteria (6)(1)(e)	Issue based on proposed model as drafted in Annex One	Reframing
(ii) does not restrict the person from performing services or work for other businesses or undertakings, including competitors, or engaging in any other lawful occupation or work, except during the time from which the person commences a specified task or engagement offered by the business or undertaking until that task or engagement is completed.	The **exclusion criteria** specifies that the business cannot restrict the person from performing work except during the time from which the person commences a specific task offered by the business until that task is completed. As worded, it is unclear whether a worker who has been contracted to complete a specified task over a period of weeks or months would be able to accept other contracts while that contract is in place. For example, if they have agreed to provide a report within four weeks, can they accept other contracts during those four weeks (where it does not impact their ability to deliver the report by the agreed date)?	Require the business to not prevent the worker from performing work for others, except during the time when they are performing work for that business.
(iv) does not terminate the contract of the person for not accepting a specific task or engagement offered by the business or undertaking.	The **termination criteria** specifies that the business does not terminate the contract for not accepting a specific task offered. While this makes sense in the context of gig-work, it is less clear what is meant by 'not accepting a specific task' in other types of contracting models.	Require that the business does not terminate the contract of a worker for not accepting a further task, or engagement in addition to what they have already agreed to do as part of the existing contract.

Annex Three – Analysis of options

Criteria Option	Effectiveness of ensuring parties to a contract for services have their original intentions upheld by placing greater weight on intention	Effectiveness of minimising risks of exploitation	Workability, implementation, cost, or other considerations (including benefits or risks not directly related to the objective)	Implications for domestic obligations (Human Rights and Bill of Rights Act)
One: Proposed model 1. Written agreement (intent criterion) 2. Worker not restricted from working for others (restriction criterion) 3. Does not require worker to be available to work certain times, days or for a minimum period (availability criterion) 4. Does not terminate contract for not accepting additional task (termination criterion)	It would increase the weight given to intention for those that meet the criteria as there is a smaller set of factors that can be considered, one of which (the intent criterion) is clearly linked to intent. The exclusion is likely to have quite a narrow application, as it would not be accessible to a lot of contracting models, where the businesses requires the worker to be available (the availability criterion). The exclusion is expected to be applicable to task-based platform work and product focused contracts (ie where the worker is contracted to provide a product or deliverable by a specified date). For this option (and all options below), the requirement to have a written agreement should promote conversations on intent at the start of the relationship. For all options, the ERA or EC may take a narrower view when interpreting the criteria. Particularly for the restriction and availability criteria, which are more subjective criteria.	The four criteria would ensure the exclusion cannot be used where the business wants more control <u>over whether and when</u> the worker performs the work. It would reduce the risk that the exclusion is used where it is not a genuine contracting relationship or in situations where there is a large degree of overlap with employment-type relationships. The proposed model may enable businesses to offer some roles that are currently considered an employment relationship as a contracting arrangement, as the criteria do not include several of the elements of the current section 6 test. In particular, roles that are currently considered casual employment relationships would be likely to meet the three substantive exclusion criteria (criteria two to four), as flexibility is the key defining characteristic of casual employment relationships. The potential unintended consequence is that employers of casual employees could change their hiring practices to fit within the exclusion and therefore move outside of the employment system. The size and significance of this issue depends largely on how the labour market responds.	For all options, the clear exclusion criteria would increase the certainty for the business models that met the exclusion criteria. This would ensure they can continue to provide their services using a contracting model in NZ. There could be a risk of worse outcomes for some workers if businesses changed their approach to no longer provide guaranteed hours to access the exclusion. For all options, there could be issues distinguishing between a task that is covered by the current agreement and an additional task. For all options, businesses in the exclusion would be able to provide additional benefits with less risk that it would impact the status of the worker (if challenged).	Low risk of natural justice implications for the worker as they would still be able challenge their status (although what they could challenge is more limited). The policy intent is that the exclusion does not directly change the status of current contractors and as such should not negatively impact any populations. Māori and Pacific people have greater representation in lower paid work. Therefore, if the exclusion led to contracting arrangements being used more frequently than at present in relationships with unequal bargaining power (which low income might signal), the risk of negative impacts for Māori, Pacific peoples, and other low paid workers could be increased.
Options to address the risk to casual employees				
Two: Add a fifth criterion that the work can be sub-contracted 1. Written agreement 2. Worker not restricted from working for others 3. Does not require worker to be available to work certain times, days or for a minimum period 4. <u>The worker is able to sub-contract the work</u> 5. Does not terminate contract for not accepting additional task	This would significantly reduce the types of business models that could meet the criteria. The exclusion could only be utilised when there is no control over when or who is delivering the product. This would mean arrangements that could be considered quite clear-cut contracting arrangements (eg consulting arrangements that require a particular worker, given their qualifications, to deliver the product) would not meet the exclusion criteria. This would limit the impact of the exclusion on the objective to ensure parties to a contract for services have their original intentions upheld.	The sub-contract criterion is intended to further distinguish between employee relationships and contracting arrangements, as the exclusion would only apply where there can be an indirect relationship (in contrast to the direct relationship in employment). This targeting will ensure it is only applicable for very clear-cut contracting arrangements. This would limit the ability for businesses could change to their hiring practices for roles that would be considered an employee relationship under the current test to fit within the exclusion. In particular, casual employment arrangements would not be expected to meet the sub-contracting criterion, as those agreements are specific to a particular worker.	Confidential Advice	Low risk of natural justice implications for the worker as they would still be able to challenge their status (although what they could challenge would be more limited). The policy intent is that the exclusion does not directly change the status of current contractors and as such should not negatively impact any populations. This is more likely to be achieved with the additional criterion.

Criteria Option	Effectiveness for ensuring parties to a contract for services have their original intentions upheld by placing greater weight on intention	Effectiveness for minimising risks of exploitation	Workability, implementation, cost, or other considerations (including benefits or risks not directly related to the objective)	Implications for domestic obligations
Three: Replace the availability criterion with a criterion that the work can be sub-contracted 1. Written agreement 2. Worker not restricted from working for others ~~3. Does not require worker to be available to work certain times, days or for a minimum period~~ 3. The worker is able to sub-contract the work 4. Does not terminate contract for not accepting additional task	This would change the types of business models that could meet the criteria. a. Business models that do require the worker to be available at specified times, but allow to the work to be sub-contracted would meet the exclusion criteria (eg potentially some courier models, as long as they met the other criteria) (if they met the other criteria). b. Business models that do not require control around when someone is available, but do not allow the worker to sub-contract the work, would not meet the exclusion criteria (eg platform models such as Uber do not allow sub-contracting). The overall impact of whether this would mean more business models could potentially utilise the exclusion, is unclear.	The sub-contract criterion is intended to distinguish between employee relationships and contacting arrangements, as the exclusion would only apply where there can be an indirect relationship (in contrast to the direct relationship in employment). However, in the absence of the availability criterion, it is unclear whether the sub-contract criterion would be effective in distinguishing between employee relationships. A criterion focused on the ability to sub-contract instead of the availability criterion would address potential unintended consequences for casual employees. The additional business models able to access the exclusion could include those where labour is substitutable, and therefore workers have low bargaining power. This could increase the issues currently associated with contractors as they would have less avenues for raising these issues.	Confidential Advice	Low risk of natural justice implications for the worker as they would still be able to challenge their status (although what they could challenge is more limited). The policy intent is that the exclusion does not directly change the status of current contractors and as such should not negatively impact any populations. Māori and Pacific people have greater representation in lower paid work. Therefore, if the exclusion led to contracting arrangements being used more frequently than at present in relationships with unequal bargaining power (which low income might signal), the risk of negative impacts for Māori, Pacific peoples, and other low paid workers could be increased.
Options to enable a broader range of contracting arrangements to benefit from the exclusion				
Four: Can either meet availability or an ability to sub-contract criteria 1. Written agreement 2. Worker not restricted from working for others 3. Does not require worker to be available to work certain times, days or for a minimum time period OR the worker is able to sub-contract the work 4. Does not terminate contract for not accepting additional task	A broader range of contracting arrangements could benefit from the exclusion, as it would include the types of business models that could utilise the exclusion in both the Proposed Option and Option Three. This would increase the types of business models that would meet the criteria and therefore have more weight given to intention.	The sub-contract criterion is intended to distinguish between employee relationships and contracting arrangements, as the exclusion would apply where there can be an indirect relationship (in contrast to the direct relationship in employment). However, in the absence of the availability criterion (as the business only needs to meet one of the alternatives under criterion thee not both), it is unclear whether the sub-contract criterion would be effective in distinguishing between employee relationships. The additional business models able to access the exclusion could include those where labour is substitutable, and therefore workers have low bargaining power. This could increase the issues currently associated with contractors as they would have less avenues for raising these issues. Potential unintended consequences for casual employees could still occur under this option.	Confidential Advice	Low risk of natural justice implications for the worker as they would still be able to challenge their status (although what they can challenge is more limited). The policy intent is that the exclusion does not directly change the status of current contractors and as such should not negatively impact any populations. Māori and Pacific people have greater representation in lower paid work. Therefore, if the exclusion led to contracting arrangements being used more frequently than at present in relationships with unequal bargaining power (which low income might signal), the risk of negative impacts for Māori, Pacific peoples, and other low paid workers could be increased.

Criteria Option	Effectiveness of ensuring parties to a contract for services have their original intentions upheld by placing greater weight on intention	Effectiveness of minimising risks of exploitation	Workability, implementation, cost, or other considerations (including benefits or risks not directly related to the objective)	Implications for domestic obligations
Five: Can either meet availability <u>or</u> can set own rate 1. Written agreement 2. Worker not restricted from working for others 3. Does not require worker to be available to work certain times, days or for a minimum time period <u>OR the worker can set own rate</u> 4. Does not terminate for not accepting additional task	This would increase the types of business models that would be able to utilise the exclusion (compared to the Proposed Option), as it could <u>also</u> be utilised in situations where the business need to have services provided at certain time or days, but the arrangement is with someone with high bargaining power (ie can set their own rate). The courts, however, already give greater weight to intention in situations where the worker has high bargaining power, meaning it may not have much (if any) impact on the weight given to intention for the additional businesses able to access the exclusion.	The criterion relating to the worker's ability to set their own rate is intended to be used as a proxy for high bargaining power. This would help ensure expansion of exclusion only includes situations where both parties wish for it to be a contracting arrangement. However, the lack of clarity on what would constitute an ability to 'set own rate' could result in misclassification risk of an employment relationship as a contacting arrangement, as it is likely to be subject to gaming. Potential unintended consequences for casual employees could still occur under this option.	It would be difficult to define what would be required for the worker to be considered to have 'set their own rates'. Even if the criterion specified that the compensation needed to be based on the rate the contractor offered, or following a certain amount of negotiation, it would still likely be subject to gaming (ie where negotiation was not genuine and did not impact the compensation offered).	Low risk of natural justice implications for the worker as they would still be able to challenge their status. Depending on the ease with which the alternative criterion could be gamed, this could disproportionately impact workers with low bargaining power that are more likely to be at risk of such behaviour.
Confidential Advice				
Options to reduce the risk of exploitation (but would narrow the range of contracting arrangements that could benefit from the exclusion)				
Seven: Include a fifth criterion "Cannot be any consequence of not accepting an additional task" 1. Written agreement 2. Worker not restricted from working for others 3. Does not require worker to be available to work certain times, days or for a minimum time period 4. Does not terminate for not accepting additional task 5. <u>No consequences for not accepting an additional task</u>	The types of business models that could access the exclusion (and therefore have greater weight given to intent) would be similar to the proposed option. However, some of those business models (eg Uber) might be excluded unless they change their current reward schemes. By increasing the things that the Court could consider, it could reduce the relative weight put on intent.	The ability of this option to mitigate risks of exploitation is similar to the Proposed Option. It would also address the risk that some businesses might use other types of levers (eg incentive schemes or removing privileges) as a way to pressure workers to accept additional tasks. Potential unintended consequences for casual employees could still occur under this option.	It could disturb businesses' incentives that are focused on encouraging efficiency and impact the ability of businesses to share potential efficiency gains with the worker. It would be difficult to define what is meant by 'no consequence'. The intent would be to capture punitive behaviour, but not providing a reward could also be considered punitive.	Low risk of natural justice implications as workers would still be able to challenge their status. The policy intent is that the exclusion does not directly change the status of current contractors and as such should not negatively impact any populations. Māori and Pacific people have greater representation in lower paid work. Therefore, if the exclusion led to contracting arrangements being used more frequently than at present in relationships with unequal bargaining power (which low income might signal), the risk of negative impacts for Māori, Pacific peoples, and other low paid workers could be increased.

Criteria Option	Effectiveness of ensuring parties to a contract for services have their original intentions upheld by placing greater weight on intention	Effectiveness of minimising risks of exploitation	Workability, implementation, cost, or other considerations (including benefits or risks not directly related to the objective)	Implications for domestic obligations
Eight: Include a fifth criterion "Must be compensated over a specified amount" 1. Written agreement 2. Worker not restricted from working for others 3. Does not require worker to be available to work certain times, days or for a minimum time period 4. Does not terminate contract for not accepting additional task 5. Compensated over a specified amount	This would narrow the business models that would be able to access the exclusion. The degree to which it would narrow access to the exclusion would depend on the level of the compensation amount set. If the specified amount was set high (as a proxy for high bargaining power), the impact of this option on the objective is expected to be low for those that could access the exclusion, as Courts already generally give a greater weight to intention where the worker has high bargaining power.	There is a trade-off between mitigating risks of exploitative practices and applicability of the exclusion. If the compensation is set high this would target the exclusion to arrangements where the worker has high bargaining power. This would help ensure the exclusion was only available where there the worker fully understood and was willing to accept the benefits and risks of being an independent contractor. The lower the compensation rate is set up, the more businesses that would be able to access the exclusion, but the higher the risk that the exclusion could be used in situations involving exploitative practices (eg the worker with low bargaining powers are pressured to accept a 'sham' contract when it is not a genuine contracting relationship or unfair or unconscionable terms). Potential unintended consequences for casual employees could still occur under this option (but only for those compensated over the specified amount).	There would be significant practical issues associated with setting a specific rate. Contracts are often compensated based on a different unit than time worked. When a worker is paid based on product completion, the rate per hour worked is often not known until the product is completed. A compensation rate based on time worked could disincentivize efficiency. The amount could be set as revenue limit, but that also comes with several practical issues as revenue does not consider the costs associated with the work. We have heard concerns in relation to the revenue threshold in other legislation, that even a seemingly high limit can sometimes be meet by workers whose profit/take-home pay is quite low due to high work-related costs. Whether the limit was high or low would vary depending on the costs associated with that type of contracting arrangement.	Low risk of natural justice implications as workers would still be able to challenge their status. The policy intent is that the exclusion does not directly change the status of current contractors and as such should not negatively impact any populations. This is more likely to be achieved with the additional criterion.

Annex Four – Examples of different business models within industries that would meet the criteria of the proposed option

The table sets out scenarios that may or may not meet the criteria in the proposed option (listed below). Our view is not definitive, as whether a particular scenario meets the exclusion option will depend on the particular facts.

1: There is a written agreement between the hiring business and the worker that states the worker is an independent contractor and not an employee; and
2: The worker is not restricted from working for another business (including competitors) except while they are completing paid work for the hiring business; and
3: The worker is not required to be available to work on specific times of day or days, or for a minimum number of hours; and
4: The hiring business does not terminate the contract for not accepting an additional specific task or engagement offered (beyond what they have already agreed to under the existing contract).

Industry	Likely to meet the criteria of proposed option	Unlikely to meet the criteria of proposed option
Digital Platform services	• Afa is a student and drives for Super-Eats. She chooses when she wants to drive, based around her study timetable. She sometimes delivers for MegaMunch when there are no Super-Eats jobs. Afa can choose which jobs to accept, and over the university holidays when she returns to stay with her family, she does not accept any jobs. • Jo is a Spreadsheet Solution Expert, providing spreadsheet-related services such as modelling, formulas, and billing calculations. She has an online profile and can apply for jobs, or clients will see her profile and offer her work. Jo chooses when and where she works, so long as she completes the job on time. Each piece of work is separate and there is no obligation to take additional tasks.	
Courier/delivery Services		• Mark works for Express Delivery, an urban delivery service. He is the sole owner of the 'run' which is a geographically defined area where deliveries are made. Mark can choose when he begins and ends his run, but he must complete the delivery of all parcels by the end of the day. He can delegate/subcontract his run to a driver approved by Express Delivery (to meet health and safety and other regulations), for example when Mark goes on holiday. He cannot deliver parcels for another company due to the sensitive information that could be shared between companies. *(Mark does not meet criterion two, as he cannot work for another business. He also does not meet criterion three, as he must be available for work and will have minimum hours he has to work, to complete his run.)*
Construction	• Sam is a plumber who has her own business. She has relationships with a number of construction companies, and also performs residential maintenance such as a plumber/drainlayer. She manages her time and accepts jobs which fit her schedule, sometimes working weekends and sometimes taking days off during the week. Her contracts require her to complete her work by a certain day, and she schedules her work across multiple jobs, in case residential projects are delayed. She also fits in residential work during times when construction companies are less busy. • Liang is a semi-professional rugby player. Construction Labour Hire (CLH) has a contractual arrangement with several manufacturing and construction companies. Liang is usually offered work by CLH on a daily, weekly or monthly basis, and she can choose to accept a job, or not. When she does take a job, her hours are specified. She has no obligation to accept jobs, and spent two weeks not working to tour with her 7s team in Australia.	• Okan is a builder's labourer and works fulltime, Monday to Friday, and the odd Saturday. He has no contract, but has had some texts with Yash, the site foreman, confirming that he will be paid fortnightly. Okan is told which work site in Wellington to work at, when to be at work, and the jobs he needs to perform. *(Okan does not meet criterion one as he does not have a written agreement stating he is an independent contractor. He also does not meet criterion two as he cannot work for another business, and criterion three as he must be available for work Monday to Friday.)* • Hyun is an apprentice builder with Krummple Construction Ltd. The company has direct control over when work will be performed, to the extent that they pick him up and drop him off each day. He is also required to do the work as required by Krummple Construction. *(The Education and Training Act 2020 defines Hyun to be an employee. Hyan does not meet criterion three – he must work when required.)*
Retail	• John is a hairdresser and make-up artist who works for several salons across Auckland. John has agreements with these salons that allow him to rent a chair on a per day basis with each of the salons and determines his own hours, and own prices. On days when he does not want to work, John does not need to book a chair.	• Victor is a retail assistant at Winter's Clothing; he works Wednesday- Sunday, 8am–6pm. Winter's require him to work in-store and his manager directs his work. He must accept additional tasks, so long as they are reasonable. *(Victor does not meet criterion three, as he is required to be in store. He also does not meet criterion four, as he must accept additional tasks that are reasonable).*
Cleaning		• Max works for TKT Cleaning Services doing vacuuming, mopping, and cleaning. He works five nights per week, Monday to Friday between the hours of 3.30pm and 9pm and term breaks. *(Max does not meet criterion three as he is required to be at work from 3.30-9.00pm.)*
Health		• Maria is a registered nurse working for Health New Zealand; her hours are determined by a roster. She is permitted to change shifts by mutual agreement with a staff member and prior approval of the manager. *(Maria does not meet criterion three, as she is required to work at specific times set by the roster.)*
Horticulture	• Edward has been working in forestry for a number of years as a specialist tree pruner. Edward negotiates piece rates as a contractor depending on the scale of the work and demand in the market for specialist pruners. Edward could choose to stop working after completing any of his contracts.	
Forestry		• Pat works for Rawaka Logging as a tree feller; cutting and removing trees. Pat works a 45 hour week, onsite from 6am-5pm. His agreement says he cannot work for other companies, and he must complete the tasks assigned to him. *(Pat does not meet criterion two, as he cannot work for another company. He also does not meet criterion three as he must be on site from 6am-5pm.)*

Annex Five: Te Tiriti and population implications

Te Tiriti Analysis

1. The latest available data on contractors shows that 5.2 percent of employed Māori are self-employed contractors, slightly below the 5.8 percent of employed Pakeha who are contractors.[1]

2. In relation to equity interests[2], the proposed option may disproportionately impact lower paid workers, who may therefore have lower bargaining power to ensure the terms of the contract are favourable to them, and industries which use contracting models more. Māori have greater representation in occupations that are likely to be lower paid such as service workers, machinery operators and labourers. They are less likely to be managers or professionals[3]. We do not have a further breakdown of the distribution of Māori who are contractors in lower paid occupations.

3. If contracting arrangements are used more frequently than at present in relationships with unequal bargaining power, the risk of negative impacts for Māori and other low paid workers could be increased. Negative impacts could include misclassification of a worker as an independent contractor to deny employment entitlements that they would be legally entitled to (sham contracting), or excessive control by the hiring business, so that the worker is effectively not in business for themselves.

4. The obligation to actively protect Māori interests[4] requires the Crown to promote equitable outcomes for Māori impacted by the proposed option, and for the protective steps to be reasonable at the particular time.[5] Minimising any resulting risks of negative impacts for workers in the design of the proposed option will help reduce potential negative impacts for all workers, including Māori.

5. In relation to taonga interests[6], the application of tikanga Māori to employment law is evolving[7], and tikanga has been considered by the Supreme Court.[8] In an employment context, tikanga is consistent with a good faith approach. If contracting relationships increase as a result of the proposed option, there will be fewer employment relationships that are subject to good faith obligations. In contracting situations where bargaining power is equal, this may not be an issue

6. The policy change could have a positive impact on Māori businesses (11 percent of New Zealand businesses[9]). When entering a contracting relationship, the proposed option will increase the likelihood of the initial intention of the parties at the time that the contract was entered into, being upheld.

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[1] Survey of Working Life, Statistics New Zealand, 2018. In MBIE's November 2019 – 2020 consultation on contractors, 6 percent of respondents identified as Māori.

[2] Equity interests include how the living standards and wellbeing of Māori are improved or could be affected by the policy. Te Arawhiti (2021), Understanding Treaty Analysis.

[3] Data from the Integrated Data Infrastructure (IDI), Stats NZ, September 2021.

[4] The principles of the Treaty of Waitangi as expressed by the Court and the Waitangi Tribunal.

[5] New Zealand Māori Council v Attorney-General [1994] I NZLR 513 (PC) at 517 [Broadcasting Assets].

[6] Taonga interests include how a policy could affect Māori rights or interests in accessing, using, protecting, or making decisions about taonga (treasures), including tikanga.

[7] 'The lens through which we look', paper delivered by Chief Judge Christina Inglis.

[8] Peter Hugh McGregor Ellis v The King - SC 49/2019.

[9] 20,499 (11 percent of all) businesses where any ownership income was paid to individuals of Māori ethnicity or descent. Te Matapaeroa 2021, Data on the Māori Economy, Te Puni Korkiri.

Population implications

7. The best available data suggests that approximately one in 20 New Zealanders (just over five percent) are contractors.[10] Five percent of European, Māori, and Asian workers are contractors, whereas less than one percent of Pacific people are contractors.[11] The majority of contractors are in the Auckland region (36 percent) and ten percent of contractors are aged 65 or over.[12]

8. The proposed option would apply only to a subset of the potential contractor pool of workers, where a business's hiring model meets the exclusion. It is likely that some businesses will change their practice or business model to be able to fit under the exclusion, but we do not know how many.

9. Māori and Pacific people have greater representation in lower paid work. As discussed in the Te Tiriti section, if the proposed option results in contracting arrangements being used more frequently than at present in relationships with unequal bargaining power, this may disproportionately impact lower paid workers. Workers with lower bargaining power are less able to ensure the terms of the contract are favourable to them.

[10] Survey of Working Life, 2018 – self reported data.
[11] 2018 Stats NZ Census data: European: 70%, Māori, 16%, Pasifika 8%, Asian 15%, MELLA 1%, other 1% (total over 100% as people identify as more than one ethnicity).
[12] Survey of Working Life, 2018 – self reported data.